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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 9, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA, ET AL.

ON THE REPORT OF THE SPECIAL MASTER

EXCEPTIONS OF THE UNITED STATES

The United States takes exception to three determinations by the Special Master as to the location of the coastline of the State of Louisiana:

1. The United States excepts to the Special Master's finding (Report, pp. 32–35) that there have been, for any period relevant to this litigation, subsidiary bays within East Bay, the closing lines of which affect the seaward limit of Louisiana's Submerged Lands Act grant.

2. The United States next excepts to the Special Master's finding (Report, p. 47) that particular low-water elevations near Pass du Bois existed as part of the baseline until December 6, 1969.

3. The United States further excepts to the Special Master's finding (Report, pp. 45–46) that Ascension Bay is an overlarge bay within the meaning of the Geneva Convention on the Territorial Sea and the Contiguous Zone, Article 7(5).

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

November 1974.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 9, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA, ET AL.

ON THE REPORT OF THE SPECIAL MASTER

MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF ITS EXCEPTIONS

STATEMENT AND INTRODUCTION

Since 1948 the United States and the State of Louisiana have been engaged in litigation over the right to exploit the valuable mineral resources of the seabed off the coast of that State. See *United States* v. *Louisiana,* 339 U.S. 699. The case has been before this Court, on the merits or on procedural issues, on a score of previous occasions. It now returns, hopefully for the last time,[1] on the Report of the Special Master appointed five Terms ago.

[1] To be sure, after disposing of the Exceptions to the Report filed by each of the parties, the Court will ultimately be asked to enter a formal decree precisely delimiting the boundary be-

1. We need not, however, rehearse the entire past history. The present controversy begins with a new suit filed by the United States in 1955, two years after the enactment of the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301, *et seq.* See 350 U.S. 990. The Court ultimately held, in 1960, that Congress had quitclaimed to Louisiana the lands underlying the Gulf of Mexico within 3 geographical miles of the "coastline." *United States* v. *Louisiana,* 363 U.S. 1. In the same decision, the United States was declared entitled to the natural resources of the seabed further seaward. However, neither the 3-mile boundary, nor the baseline from which it must be measured, was located. The decree subsequently entered simply defined the coastline in the language of the Submerged Lands Act, 43 U.S.C. 1301(c): "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters," 364 U.S. 502, 503. And, recognizing

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tween State and Federal submerged lands and requiring the parties to account for revenues derived from disputed areas. We anticipate, however, that such a decree can be formulated by agreement once the Court has rendered its decision. Otherwise, a reference to the Special Master for that limited purpose may be appropriate. See Report, p. 53.

It is also true that, because of the ambulatory character of the coast, further proceedings at some future time may become necessary. See Report, pp. 53–54. But, on the side of the United States at least, it is hoped that the parties will take up the Court's suggestion that the line now fixed will be "frozen" for a substantial period by agreement. See 394 U.S. 11, 34. To that end, we invite the Court to make clear, once again, that such a binding agreement is appropriate and, so far as the Federal Constitution is concerned, requires no legislative approval.

that the parties might disagree on the application of that definition to the Louisiana coast, the Court reserved jurisdiction "to entertain such further proceedings, enter such orders and issue such writs as may * * * be deemed necessary or advisable to give proper force and effect to this decree." 364 U.S. at 504.

As it turned out, no agreement was reached and, by cross-motions filed in 1968, both parties requested a supplemental decree specifically designating the seaward limit of the lands under the Gulf of Mexico owned by Louisiana. After oral argument, the Court rendered an opinion resolving many of the issues involved. *United States* v. *Louisiana,* 394 U.S. 11. Most importantly, the principles of the intervening decision in *United States* v. *California,* 381 U.S. 139, were held applicable to the present controversy, so that the delimitation of "inland water" here, as there, is controlled by the rules announced in the international Convention on the Territorial Sea and the Contiguous Zone, T.I.A.S. No. 5639, 15 U.S.T. (Pt. 2) 1606. Applying those rules, the Court itself rejected Louisiana's claim based on the so-called "Coast Guard line" and effectively settled the boundary between State and federal submerged lands along much of the coast. This made possible the subsequent entry of decrees removing large areas from dispute. See 404 U.S. 388; 409 U.S. 17.

There remained, however, several issues with respect to which an evidentiary hearing was deemed appropriate. Most of these concerned water areas which

Louisiana claimed as "inland," either because they were said to qualify as "juridical bays" under the international Convention,[2] or on the ground that they were "historic bays" exempted from the strict criteria of the Convention.[3] To resolve those questions, as well as other relatively minor factual disputes,[4] the Court appointed a Special Master. 395 U.S. 901.

In a joint Pretrial Statement dated December 5, 1969 (Report, pp. 55–62),[5] counsel for both parties set out the issues which they believed to be before the Special Master in this case.[6] Thereafter, the Special

[2] For the Court's convenience, we have printed, as Appendix A to this memorandum (pp. 33–34, *infra*), the full text of Article 7 of the Convention which governs juridical bays.

[3] In either case, the 3-mile belt granted to the State by the Submerged Lands Act would be measured from the closing line of the "bay," which represents the "seaward limit of inland waters." In some areas (as with respect to East Bay), the parties disagree as to whether *any* bay affecting the Submerged Lands Act grant exists. More often, the dispute involves the location of the bay closing line.

[4] Primarily, these factual issues concern the existence or non-existence of certain mudlumps, low-tide elevations, or spoil banks, during relevant periods. See 394 U.S. at 40–41 n. 48.

[5] As the introduction to the Pretrial Statement recited (Report, p. 55), it consisted of three parts, designated "A", "B" and "C". The Master's Report reprints only Part A. Because we shall have occasion to refer to it here and in our Reply Brief, we have printed Part B of the Pretrial Statement as Appendix B (pp. 35–36, *infra*) to this memorandum. Part C has no continuing relevance and is omitted.

[6] By a subsequent Stipulation (Report, p. 62), the Statement was amended. As the hearings progressed, a few additional or subsidiary issues emerged. Except insofar as the Pretrial Statement expressly foreclosed the matter, the parties and the Special Master agreed that these, too, should be resolved in order to avoid a wasteful remand of the case.

Master held a number of hearings. The United States and the State of Louisiana submitted numerous exhibits and examined many witnesses who testified on legal and factual matters relevant to the ultimate location of Louisiana's coast. At the invitation of the Master, both parties submitted exhaustive briefs and presented oral argument on several occasions. The Master has now filed his Report and the Court, on October 15, 1974, directed the filing of any exceptions thereto by November 29.

2. The United States accepts all of the Special Master's conclusions with only the three exceptions already noted. We here address ourselves entirely to those exceptions, deferring argument in support of the balance of the Master's Report until our response to Louisiana's exceptions.[7]

We stress that our exceptions do not challenge factual determinations based on the sifting of massive documentary evidence or the appraisal of witnesses.[8] On the contrary, our principal argument under Points I and III requires no more than the application of

[7] Whether or not the State excepts to all of the Master's conclusions which the United States accepts, we shall address each of those conclusions in our response—if only by adopting the appropriate passage of the Report. On some issues, we shall buttress the Master's conclusions with additional arguments. And, in rare instances, we may support the result on independent grounds, without endorsing all the Master's subsidiary findings or his reasoning. The present exceptions are directed only to *results* we challenge and our failure to except to any finding or statement in the Report should not be understood to imply that we accept it as correct.

[8] Compare, *e.g.*, the Special Master's resolution of the "historic inland water" claim, which accounts for the bulk of the record.

legal principles already settled by the Court to a physical situation fully revealed on stipulated maps. Except for the maps, no reference to the record is necessary or appropriate to resolve those questions. Nor is the operation one that requires special expertise. The answer turns essentially on visual impression, informed by strict observance of legal criteria.[9]

To be sure, the situation is somewhat different when we challenge the Special Master's finding that certain low-tide elevations existed at relevant times (Point I(B) and Point II). As it happens, however, our quarrel is with the Master's automatic acceptance of the Coast and Geodetic Survey's 1200 series charts for these areas. There is no dispute about what those maps show: our submission is simply that, in the circumstances, they should not be deemed controlling. If we are correct, it is true that reference to the record may become necessary.[10] But we have no reason to believe that there is any disagreement as to what the evidence shows, once it is ruled that the Master's reliance on the 1200 series charts was improper.

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[9] So saying, we do not underrate the useful function served by the Special Master. His findings have eliminated many subsidiary issues and have narrowed others. Thus, in East Bay, the Master's determination as to the correct application of the semicircle test reduces the dispute (at least so far as we are concerned) to the propriety of two proposed bay closing lines.

[10] Even here, reference to the record is unnecessary if the Court accepts our submission that, in the circumstances, the special set of 54 maps should have been deemed controlling. See pp. 17–20, *infra*.

ARGUMENT

I

THERE ARE NO LESSER BAYS WITHIN EAST BAY WHICH AFFECT THE EXTENT OF LOUISIANA'S SUBMERGED LANDS ACT RIGHTS

The United States and Louisiana have continually disagreed on the location of the coastline within East Bay. Prior to the Court's 1969 decision, 394 U.S. 11, the State argued that the whole of East Bay was a juridical bay, from the tip of the jetties at South Pass to the tip of the jetties at Southwest Pass. This Court held otherwise, pointing out that the water area "enclosed" by a line connecting the jetties was not sufficiently large to meet the so-called "semicircle test" established by Article 7(2) of the Convention on the Territorial Sea. 394 U.S. at 53–54. In the Special Master proceedings, Louisiana proposed a number of alternative closing lines within East Bay, labelled from A (the most seaward) through D (the most inland). Two of the closing lines, C and D, admittedly enclose enough water to satisfy the semicircle test.[11]

The Special Master found: (1) that prior to December 6, 1969, the area enclosed by Line C constituted a

[11] We fully accept the Special Master's application of the semicircle test. See Report, pp. 29–31. When we speak of "enclosing enough *water* to satisfy the semicircle test," we treat as "water" any islands or low-tide elevations within the indentation, as required by Article 7(3) of the Convention (Appendix A, *infra*, p. 33) and the Master's ruling.

juridical bay; and (2) that, thereafter, Line D represented the seaward limit of inland waters in East Bay. Report, pp. 34–35. December 6, 1969, is the date after which the land formation referred to as "Cow Horn Island"—the eastern terminus of Closing Line C—no longer appeared on large-scale nautical charts of East Bay issued by the federal government (the Coast and Geodetic Survey's 1200 series charts).

In order to reach the conclusion that Lines C and D enclosed juridical bays for periods relevant to this litigation the Special Master found that those areas, besides satisfying the semicircle test, met the other requirements of Article 7 of the Convention and that Cow Horn Island actually existed above mean low water. We challenge both propositions.

A. LOUISIANA'S PROPOSED CLOSING LINES C AND D DO NOT ENCLOSE JURIDICAL BAYS

As we have noted, this Court expressly held in 1969 that the entirety of East Bay is not a juridical bay under the Convention on the Territorial Sea and the Contiguous Zone because it does not contain enough water area to meet the semicircle test requirement of Article 7(2). 394 U.S. at 53. But that was not the only ruling relevant to East Bay. Responding to the State's proffer of another closing line which met that test, the Court said: "We cannot accept Louisiana's argument that an indentation which satisfies the semicircle test *ipso facto* qualifies as a bay under the Convention." *Id.* at 54. Without foreclosing the possibility that a lesser bay existed, the Court stressed that no such finding would be justified unless all the other

criteria of Article 7 were met: " 'a well-marked indentation' with identifiable headlands which enclose 'landlocked waters.' "[12] *Ibid.* We submit that injunction has not been followed.

The Special Master, we believe, reached his conclusion by a path which begins at the wrong place. Although not expressly articulated, we think it fair to say that implicit in the Master's treatment of East Bay are three assumptions: (1) that there is, almost certainly, a true bay *somewhere* within East Bay which affects the Submerged Lands Act grant, the task being to define it; (2) that the natural entrance points of that bay need not be apparent when one looks at the map; and (3) that any body of water that satisfies the semicircle test is presumptively a juridical bay. We challenge each of these premises, and suggest that the Master's determination cannot survive when those false supports are removed.

1. The reality is that, unless East Bay as a whole qualifies (which it does not, as the Court has already held), there is *no* smaller juridical bay within the

[12] To be sure, the Court also noted that East Bay (like all other areas claimed as historic inland waters) is an "indentation sufficiently resembling [a] bay" that it would "clearly qualify under Article 7(6) if historic title can be proved." 394 U.S. at 75 n. 100. But, the Master to the contrary notwithstanding (see Report, p. 28), that has no bearing here. Indeed, Article 7(6) (Appendix A, *infra*, p. 34) expressly exempts "historic bays" from the criteria established in that Article for juridical bays, as the Court repeatedly noted. See 394 U.S. at 53 n. 72, 74, 75 n. 100. Accordingly, the finding that East Bay is sufficiently bay-like to qualify as an "historic bay" says nothing whatever on the issue whether any of the tests announced in Article 7(2) are satisfied.

area (except only minor "pocket" bays which are so situated that they do not affect the boundary of the 3-mile grant).[13] That is, after all, what one would expect. East Bay is essentially a triangle whose "height" (or "depth") is barely more than half the length of its wide base opening to the sea. No body of water so shaped can ever qualify as a bay, if only because it cannot meet the semicircle test. Nor can *any more "inland" part* of such a triangle satisfy the semicircle test.[14] It is therefore *surprising* to find that any line can be drawn in East Bay so as to "enclose" enough water to meet the test. Such a closing line is immediately suspect.[15]

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[13] The most important of these "pocket bays"—numbered from 1 through 5—are indicated on Drawing 1, following p. 14, *infra*. They do not affect the 3-mile grant because arcs swung from points on the shore, or the territorial sea of islands or low-tide elevations seaward of the "pocket bays," produce a more seaward 3-mile line than would be the case if the closing lines of these bays were used as a baseline. There is no dispute between the parties on this point.

[14] The area of a triangle will not equal that of a semicircle drawn on the same "base" (or diameter) unless the "height" or "altitude" of the triangle is well over three-quarters the length of the "base." The "base" of the East Bay triangle is approximately 16 nautical miles; its "height" is just over 8 nautical miles. Nor will a triangle satisfy the semicircle test if the angle opposite the baseline exceeds 65°. Accordingly, since the northern angle of the East Bay triangle is substantially more obtuse, no smaller "interior" triangle will satisfy the formula.

[15] We note that the argument presented here is *not* the same as that rejected by the Master at pages 27 and 28 of his Report. The proposition there discussed was that an indentation which is shaped like an inverted V does not qualify as a bay, *even if it meets the semicircle test*, because it cannot be deemed "land-locked." We adhere to that view, but it should not be confused with the narrower point urged here which depends on the un-

When we examine the lines in question, we see how artificially contrived they are. They are in fact nothing more than impermissible fallback lines that work mathematically under the semicircle test only because they capture discrete little pocket bays that are *seaward* of the line—a very odd basis for defining a bay. But, as we have seen, that is not enough. To qualify as a true bay, the body of water behind the closing line also must be "a well-marked indentation, with identifiable headlands which enclose landlocked waters." Those criteria are not met here.

2. The arbitrariness of Closing Lines C and D is starkly revealed if one begins with an unmarked map of East Bay and asks oneself "where does the bay begin?" See Drawing 1, following p. 14, *infra*. If there is a bay at all, it ought to be visually obvious. One would look for the natural entrance points which help to "enclose" the "landlocked" waters of the bay and separate it from the open sea. We search the map in vain: No such "headlands" appear because, on both sides of the triangle, the coast is essentially straight.[16] Conceivably, some might be tempted to choose

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controvertible premise that *some* triangular bodies of water—those which are very much wider than high—cannot satisfy the semicircle test.

[16] Dr. Robert Hodgson, Geographer of the Department of State, made the point forcibly (Tr. p. 5373):

> The shape of the feature [East Bay] which is contained within these two passes is essentially that of a triangle in which the base, that portion toward the sea, is exceedingly wide, it is very open.
>
> There is no significant geographical feature existent up to the point where I have drawn the line to separate the waters of this feature from the main waters of the Gulf.

The "line" Dr. Hodgson marked merely defines what we have

the tips of the jetties as the natural entrance points of the bay, albeit their direction, at least on the west side, does not help "enclose" any body of water. But, at all events, once that selection is rejected, it is impossible to define visually the true entrances of a bay. Certainly, no non-mathematician would see that the points on which Closing Lines C and D are anchored define the beginning of a bay, nor conclude that the waters inland of those lines are any more "landlocked" than the waters immediately seaward. See Drawing 2, following p. 16, *infra*.

What we have sought to demonstrate is that Closing Lines C and D are not—as they should be—lines which *apparently* separate an inland bay from the open sea and which survive when tested mathematically. On the contrary, the operation was done in reverse: these lines were chosen because, by virtue of a geographical "fluke", they meet the semicircle test; and, afterwards, they were sought to be justified as marking the limits of a natural bay. That procedure is inadmissible. One ought to be able to see the bay on the map at first glance, as the Convention itself makes clear.

Indeed, the *first* condition that must be satisfied under Article 7(2) before a body of water can be deemed a putative bay is that it be "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked

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labelled Pocket Bay 2, at the very north end of East Bay. See Drawing 1, opposite. As already noted (n. 13, *supra*), it does not affect the 3-mile limit.

waters * * *."[17] The semicircle test is an *additional* criterion, imposed as a second check. Until and unless one has isolated a landlocked body of water on the chart, there is no occasion to resort to the planimeter to apply the semicircle test.

3. If we are correct that no true bay less than the whole of East Bay (except minor pocket bays that have no practical effect) is visible to the eye, that is an amply sufficient ground for rejecting Closing Lines C and D—or any other bay closing line inside East Bay. But we reach the same result even if we follow the kind of *ex post facto* analysis suggested by the Special Master's Report and focus only on the lines actually proposed.

The most obvious objection is that the anchor points for Closing Lines C and D do not qualify as "headlands" of a bay. They are nothing more than slight protuberances on an otherwise straight coast. They do not substantially depart from the general contour of the shore.[18] To be sure, the points selected may be headlands of small pocket bays along the levee of

[17] Indeed, the history of the Convention clearly indicates rejection of the semicircle test as the primary definition of a juridical bay. See 1 *Yearbook of the International Law Commission* (1955), pp. 206–207, 210–211.

[18] See I Shalowitz, *Shore and Sea Boundaries* (1962), p. 57 n. 57, an authority quoted extensively by Louisiana before the Special Master (La. Opening Brief, Vol. IV, p. 110). Commenting on the *California* case, Mr. Shalowitz wrote: "we can define a headland generally as 'the apex of a salient of the coast; the point of maximum extension of a portion of the land into the water; or a point on the shore at which there is an appreciable change in direction of the general trend of the coast,'" adding, "[t]o consider these protuberances as headlands of a bay, they must bear a definite relationship to the curvature whose status is being determined." See, also, *id.* at 64 n. 77.

South and Southwest Passes.[19] But they contribute nothing to "enclosing" the main body of water to the north, to help make it "landlocked." Not surprisingly, when we look at the area landward of those lines, we cannot see what divides those waters from the open sea beyond, except the artificial line drawn on the map. We must conclude that the Special Master has too quickly accepted closing lines which were selected only because they satisfy the semicircle test, without properly examining whether their termini qualified as the natural entrance points of a true inland bay.

The argument just concluded, if correct, requires the rejection of both Closing Lines C and D, and, *a fortiori,* of Closing Lines B^1 and C^1 disallowed by the Master himself. See Report, p. 32.[20] Our submission has been that there is no true bay within the area of East Bay which affects the outcome. We now turn to an independent objection, applicable to Closing Line C only: the non-existence of "Cow Horn Island" on which that line is anchored.

B. COW HORN ISLAND DID NOT EXIST AT ANY TIME RELEVANT TO THIS LITIGATION

The eastern terminus of Louisiana's proposed Closing Line C is located on a low-water elevation shown

[19] Thus, the point selected as the western terminus of both Lines C and D is a headland for Pocket Bay 1; the eastern terminus of Line C is a headland for Pocket Bay 4; and the eastern terminus of Line D is a headland for Pocket Bay 3. See Drawing 2, opposite.

[20] These are the only lines proposed that satisfy the semicircle test. See Report, pp. 29–31. We would, however, interpose the same objection to Closing Line A, its variants, and Closing Line B, if they met the semicircle test.

near the eastern shore of East Bay on a number of large-scale charts and labelled "Cow Horn Island" by counsel for the State. If that formation did not exist after June 1950,[21] the line has no basis. We submit the Special Master erred in finding that "Cow Horn Island" subsisted beyond 1949.

1. We begin with the omission of "Cow Horn Island" on the set of 54 large-scale maps of the Mississippi River delta prepared for the State of Louisiana and the United States in 1959 for use in this litigation. See Report, p. 32. These maps, constructed at four times the scale of the standard large-scale nautical charts of the Louisiana coast, have been stipulated as accurately depicting most of the coast by both parties.[22] To be sure, for some areas—including this one—the State declined to be bound by these maps and

[21] The critical date for the accounting ultimately required between the parties is June 5, 1950, when the first decision was entered in this litigation. See 340 U.S. 899, 900. While the Submerged Lands Act, 43 U.S.C. 1311(b)(1), forgave any violation of the 1950 decree with respect to the 3-mile belt quitclaimed to the State in 1953, it had no effect on any accounting due for exploitation by State lessees beyond that boundary.

[22] These maps, commonly referred to as the "set of 54 maps" or the "special maps," were before this Court in 1969, were filed with the Special Master at the outset of the present proceedings (see Pretrial Statement, Part B, Appendix B, *infra*, p. 35), and are now part of the record filed with the Court. Although bound in a single volume, the maps are in three groups of 41, 8 and 5 maps respectively, and are accordingly referred to as, *e.g.*, "Map 6 of 41," or "Map 6 of 8", etc. There are three exemplars of the volume in the record, one unmarked, a second showing the submission of the United States as to the correct location of the coastline (U.S. Ex. 389), and a third showing Louisiana's maximum submission (La. Ex. 353).

"reserve[d] the right to show" that the physical situation was different. Pretrial Statement, Part B, ¶(d), Appendix B, *infra*, p. 35. But that does not render the maps valueless; they remain *prima facie* correct, although impeachable by better evidence.

What, then, was the evidence that persuaded the Special Master to depart from the special maps on the issue of the existence of "Cow Horn Island"? It was nothing more than the appearance of "Cow Horn Island" on the less detailed Coast and Geodetic Survey's 1200 series of charts until December 1969. Report, p. 33. This automatic deference to the "official" chart, the Master apparently believed, was compelled by the Convention itself. See Report, p. 24. In our view, that was a wholly unwarranted progression.

Article III of the Convention (Report, p. 24), it is true, specifies that the low-water line, where relevant, shall be that "marked on large-scale charts officially recognized by the coastal State." But that provision is not dispositive here. First, it was always recognized that, in proper cases, such charts could be impeached. See, *e.g.*, 1 *Yearbook of the International Law Commission* (1954), p. 65. Second, it would be a very narrow reading of the Convention to suppose that its drafters meant to prefer the "official" charts when more detailed, more careful, and more current maps were available. And, finally, only the most literal-minded can interpret the Court's ruling that the Convention governs this case to mean that the parties to this domestic controversy are bound by charts published for a wholly different purpose, at

least when better evidence, specifically addressed to the issues in the case, is available. Compare the Court's treatment of "historic inland water," 394 U.S. at 77–78.

The Special Master's approach ignores the reason behind the laborious undertaking that resulted in the special set of 54 maps. Obviously, no such effort was necessary if the parties were content to accept the official 1200 series charts as accurately depicting the Louisiana coast. There were at least three objections to the 1200 series charts: (1) they were not sufficiently large-scale to reflect all necessary detail; (2) in the absence of a re-survey, the new issues of those charts merely reproduced earlier editions (in this case based on information gathered in 1939, Tr. p. 5097); and (3) these charts, in the interest of navigational safety, tended to resolve all close questions by exaggerating the extent of low-water lines, Tr. p. 4951. It was therefore entirely inappropriate to resort to these rejected charts merely because Louisiana declined to stipulate the correctness of the more careful set of 54 maps in the area.

Nor did the stipulation entered into by the parties justify the Special Master's solution. The Pretrial Statement recites that, in certain areas, Plaintiff or Defendant reserves the right to challenge the accuracy of the set of 54 maps, otherwise accepted as final for the purpose of this litigation. The United States always assumed that, to prevail, it must demonstrate the error on the special map by *better* evidence. See Pretrial Statement, Part B, ¶¶ (a) and (b), Appendix B, *infra,* p. 35. To be sure, Louisiana,

in two instances (*id.* at ¶¶ (c) and (d), Appendix B, *infra*, p. 35), reserved the point that the official 1200 series charts "must be given effect." But that was never *agreed*. On the contrary, then as now, the United States maintained that the special maps could not be successfully attacked simply by showing that the 1200 series charts depicted a different coastline. Indeed, it has always seemed to us plain that the Court intended the resolution of geographical disputes by resort to the *best* evidence—not an arbitrary reference to official charts. See 394 U.S. at 40–41 n. 48. And see Report, pp. 24–25.

2. We have said enough to invalidate the Special Master's reliance on the 1200 series charts as establishing the existence of "Cow Horn Island" until December 1969. The question remains, however, whether there was any independent basis for that conclusion. There was none. One witness for the State, it is true, testified that, while flying over East Bay in the 1950s, he saw birds standing on "Cow Horn Island." But that evidence, wholly unrelated to tidal datum and presumably reciting an observation during abnormally low water, is wholly unsatisfactory, as the Special Master concluded. See Report, p. 33. It follows, we submit, that the existence of "Cow Horn Island" for any relevant period was never proved. Nor is that all. In the event, there was persuasive factual evidence corroborating the indication of the set of 54 maps.

Mr. Bennett G. Jones testified at great length about how the 1959 maps were constructed.[23] He fully de-

scribed the procedures involved in the aerial survey, which produced the photography used for the mapping, and the subsequent field survey which was conducted to verify the aerial work. Mr. Jones explained that the survey party, which he led, knew the purpose of the project and was aware of the importance of accurately locating the low-water line. He noted that the party was familiar with Coast and Geodetic Survey's chart 1272, indeed used it for navigation while in the area, and as a result paid particular attention to differences between the low-water line as shown on chart 1272 and the actual line as it existed in 1959. In this regard, Mr. Jones testified that "a long narrow low water spit" [Cow Horn Island], appearing on chart 1272, did not appear in the 1959 aerial photos. Tr. p. 4430.

Mr. Jones also reviewed numerous aerial photographs of East Bay which had been taken between 1949 and 1959. United States Exhibits 213–226. He testified that he considered these to be good photographs for his purposes and, after taking known tidal data into account, was able to give his opinion that the low-tide elevation near the western levee of South Pass [Cow Horn Island] did not exist between 1949 and 1959. Tr. p. 4447.

This evidence, we believe, is dispositive. The fact is that "Cow Horn Island" has not existed above mean

[23] Mr. Jones was employed by the United States Coast and Geodetic Survey from 1925 until 1969. During most of that time he was engaged in photo interpretation work for the production of nautical charts. Tr. pp. 4353–4364.

low water since 1949. Accordingly, there is no basis for Closing Line C.

II

THE EXTENSIVE LOW-TIDE ELEVATIONS BETWEEN PASS DU BOIS AND PASS TANTE PHINE DID NOT EXIST AT ANY TIME RELEVANT TO THIS LITIGATION

Our second exception relates to the location of the low-water line between Pass du Bois and Pass Tante Phine on the western side of the Mississippi River Delta. The difference between the parties is illustrated on Drawing 3, opposite. It will be seen that the State extends the coastline seaward by virtue of extensive low-tide elevations (dark areas), the existence of which is disputed by the United States.

Here, as in the case of Cow Horn Island, Louisiana did not accept the low-water line as shown on the special set of 54 maps. See Pretrial Statement, Part B, ¶ (c), Appendix B, *infra*, p. 35. Accordingly, the State was free to show that, contrary to the indication of those maps, substantial low-tide elevations extending outward from the coast existed for relevant periods. But, in the event, the State produced no evidence whatever; it merely pointed out that the Coast and Geodetic Survey 1200 series chart for the area indicated such low-tide elevations until the December 1969 edition. On that basis alone, the Special Master accepted Louisiana's proposed baseline. See Report, p. 47, ¶ (c).[24] We submit this was plain error.

[24] The Master's summary conclusion does not reveal his reasoning. But the sequence of events indicates that he followed the same course as with respect to Cow Horn Island. When, in

We have already suggested why, in our view, the Master could not properly resolve any dispute as to physical facts by simply resorting to the 1200 series charts. In summary, that short-cut procedure is inappropriate because it makes nonsense of the expensive and careful undertaking involved in producing the more detailed set of 54 maps, and is, moreover, at odds with the Court's 1969 opinion which required the parties to produce factual evidence in such cases. Our submission is that a party challenging any geographic fact depicted on the special set of 54 maps must prove the true situation by *better* evidence—not a mere reference to the 1200 series charts which were early rejected as not sufficiently exact. It follows that, in the circumstances—Louisiana having offered no contradictory evidence whatever—the set of 54 maps ought to control.

As it happens, however, the United States introduced further evidence. Indeed, uncontradicted testimony showed: (1) that the disputed low-tide elevations were carried on successive editions of Chart 1272 until the end of 1969 solely on the basis of a 1936 survey (Tr. p. 4670); (2) that aerial photographs, analyzed by an expert in connection with weather,

---

the last weeks of the proceedings, the Master indicated that he would make no determination with respect to this area, the United States proposed a finding based on the set of 54 maps, and, thereafter, Louisiana proposed the finding based on the 1200 series chart. It is not clear whether, at that last moment, the Master focused on the independent evidence submitted by the United States and the State's failure to produce any evidence. Following his own guidelines, it would seem the Master should have gone behind the 1200 series chart for this area. See Report, pp. 24–25.

tide and river information, negated the existence of these low-tide elevations between 1949 and 1959 (Tr. pp. 4446–4448); and (3) that the disputed formations still had not reappeared above mean low water in 1970 (U.S. Ex. 200, Vol. 2; Tr. pp. 4510, 4673). Accordingly, the Master's rejection of the low-water line shown on Map 7 of 8 of the set of 54 maps was not only without basis; it was contrary to the only evidence in the record.

III

ASCENSION BAY IS NOT AN OVERLARGE BAY

Throughout this litigation Louisiana has contended that the vast water area which washes the Mississippi Delta on the west—labelled by the State "Ascension Bay"—qualifies as an overlarge bay.[25] See Drawing 4, following p. 26, *infra*. The Court considered this area in its 1969 decision, concluding that it meets the semicircle test (394 U.S. at 51–53), but leaving it to the Special Master to determine in the first instance whether the area satisfies the other requirements of a juridical bay: that it be a well marked indentation with headlands, and that the indentation enclose landlocked waters (394 U.S. at 48 n. 64). We submit the

[25] As the Court has had occasion to explain (394 U.S. at 48–49 n. 64), the Convention recognizes that a body of water which satisfies all the criteria of Article 7 may be a bay even though the width of its mouth exceeds 24 miles. In that event, however, the seaward limit of inland water is not a line across the mouth, but a "fallback line" of 24 miles inside the bay, so located as to enclose the maximum area of water. Article 7(5), Appendix A, *infra*, p. 34. We do not quarrel with the Master's location of this fallback line here *if* "Ascension Bay" is indeed a true bay.

Master erred in resolving that issue in the affirmative. See Report, pp. 45–46.

1. Because no obviously "landlocked" waters are revealed on the map, it is important to identify the area which is said to constitute "Ascension Bay." The Special Master was somewhat reluctant to commit himself on this score,[26] presumably because several alternative closing lines would satisfy the semicircle test[27] and the exact boundaries of the bay would not affect the location of the fallback line—the only line that ultimately controls the result. But those are not valid excuses. As this Court expressly held in rejecting Louisiana's alternative closing line for East Bay in 1969, the fallback principle applies *only with respect to a true bay* (394 U.S. at 53–54), and a body of water that satisfies the semicircle test does not, on that ground alone, qualify as a bay (394 U.S. at 54). It was, therefore, essential, here as elsewhere, first to establish that there exists a "well-marked indentation" with identifiable headlands which enclose "land-

[26] The Master initially made no determination whatever as to the entrance points of "Ascension Bay" and the finding in the final Report was included only after the United States suggested the necessity of fixing the boundaries of "Ascension Bay". See *Memorandum of the United States Commenting on the Special Master's Draft Report*, pp. 13–14. The Master now defines "Ascension Bay" as the area enclosed by a line running from the tip of a jetty at Belle Pass to the tip of the jetty at Southwest Pass, but adds that other unspecified closing lines "could also be drawn" or "could also be selected." Report, pp. 45, 46.

[27] This is only by virtue of the Court's ruling that the Caminada-Barataria Bay complex, as well as the islands screening those bays, must be included as part of "Ascension Bay" for the purpose of applying the semicircle test. 394 U.S. at 52–53.

locked waters." Yet, no such conclusion has meaning except as related to a defined area: how can one say that an indentation is "well-marked," that it has "identifiable" headlands, and that the included waters are "landlocked," without knowing the boundaries of the alleged bay?

So saying, we do not mean to suggest that the Special Master should have approached the issue by confining his attention to any closing line or lines proposed by the State. On the contrary, as with East Bay (*supra,* pp. 13–15), we believe the best procedure for judging whether any bay exists is first to study an unmarked map of the area. Indeed, we invite the Court to perform that operation for itself by referring to Drawing 4, opposite. If the Court agrees with us that no identifiable bay is revealed by such an examination (except, of course, the Caminada Bay-Barataria Bay complex and West Bay),[28] that should be an end of the matter. On the other hand, however, it is clearly improper to decide the issue in favor of Louisiana on the ground that there is a true bay *somewhere* in the general area—never mind precisely where it begins.[29]

[28] Although disagreeing with the State as to the proper closing lines for those bays, the United States has always acknowledged that the named bays qualify. The Court's ruling that the waters of the Caminada-Barataria Bay complex may be deemed part of "Ascension Bay", and the screening islands treated as water, of course applies only if "Ascension Bay" is a true bay. See 394 U.S. at 48–50 n. 64, 58–59 n. 79.

[29] To be sure, because the fall-back line ultimately controls, it is not necessary, in the case of an overlarge bay, to be *quite* as precise. Thus, quibbles about the exact location of the terminus of the closing line on a particular headland need not be resolved. But the headland itself must be identified.

Accordingly, we look to see what might be deemed arguable entrance points for "Ascension Bay." Our own inspection of the map suggests only two remotely bay-like areas, one defined by a closing line beginning (on the west) at the Belle Pass Jetty and ending at the tip of the northwestern jetty of Southwest Pass, the other defined by a line between the western headland of Caminada Pass and the same Southwest Pass jetty. See Drawing 5, following p. 28 (first map), *infra.* Although the Special Master expressly mentioned only the first of those alternatives,[30] we assume he may have accepted the second closing line as one that "could also be drawn," and we therefore consider both.

2. The Special Master's conclusion that "Ascension Bay" qualifies as a true bay—the semicircle test aside—is explained in the Report by the following three sentences only (p. 45):

> Certainly its waters are landlocked, or, as sometimes described, ***Inter Fauces Terrai,*** within well marked natural entrance points. This is supported by the ratio of its depth of penetration to the width of its mouth, for it is almost perfectly semicircular in shape, the classic form of a bay. In this respect, it bears a startling resemblance to Monterey Bay, which was held to be a true bay in the California case.

[30] The Special Master twice refers to the "tip of the *east* jetty at Southwest Pass" as the eastern headland of "Ascension Bay". Report, pp. 45, 46. We assume this was a slip of the pen and that he meant the "*west*" or "northwest" jetty of Southwest Pass.

We challenge both the first and last sentences, and suggest that the intervening statement, if true, does not support the result.

a. We begin with the assertion that "Ascension Bay" is "almost perfectly semicircular in shape." That is something of an exaggeration. Indeed, no matter what closing line one uses, a semicircle drawn on that base very substantially invades the mainland, as Drawing 6, opposite (second map), demonstrates. The basic shape of the claimed bay is an appreciably shallower curve. It satisfies the *semicircle test* only because, in addition to the pocket of West Bay, the Court has held that waters of the Caminada-Barataria Bay complex, as well as the islands screening those bays, may be included. But, even if "Ascension Bay" were truly an "almost perfect semicircle", that would lend little weight to the claim.

The truth is that a perfect semicircle is *not* "the classic form of a bay." On the contrary, the classic bay is shaped more like a C, with an interior width greater than the length of its mouth, or like a U, with a depth greater than the width of the mouth. The C-shape is the characteristic of Monterey Bay,[31] relied on by the Master, and of Hawke Bay. New Zealand,

[31] Monterey Bay is well illustrated in an appendix to the opinion of Mr. Justice Black, dissenting, in *United States* v. *California*, *supra*, 381 U.S. following p. 213. As indicated there, the mouth of Monterey Bay is only some 19 miles (as compared to 42 miles for "Ascension Bay"), while its maximum interior width, behind the headlands, is substantially greater. The only feature it shares with "Ascension Bay" is a general circular contour with a depth of penetration slightly less than half the length of the mouth.

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invoked by Louisiana; the U-shaped bay is typified by Mobile Bay, Alabama and Cape Cod Bay, Massachusetts. Such formations are more bay-like because they are more evidently "landlocked" than a mere semicircle. Indeed, it is doubtful if any perfectly semicircular area would qualify as a "well-marked indentation" enclosing "landlocked waters" without some additional feature, such as pinched headlands. See Tr. p. 5380.

b. At all events, "Ascension Bay"—the Master to the contrary notwithstanding—has no "well-marked entrance point" on the west.[32] Unlike even a perfect semicircle which would begin with a definite departure from the general direction of the coast, the suggested western termini for the "Ascension Bay" closing line offer no forewarning that we are entering a bay. To be sure, the Belle Pass jetties protrude slightly from the shore, but, once we have passed them, the coast curves outward, not inward as one would expect. Nor does the western headland of Caminada Pass give the slightest clue that a large bay to the *south* is ahead. That promontory does not deviate from the general contour of the shore; it merely announces the entrance of a bay to the *north* (Caminada Bay). The plain fact is that these landmarks were chosen to define the western boundary of "Ascension Bay" for want of anything better. Neither qualifies as a "headland" or "natural entrance point."

c. In this respect, the situation here is so obviously different from the very pronounced "pinched" head-

[32] We accept that, on the east, the Southwest Pass jetty more nearly qualifies as a "natural entrance point," albeit we believe it marks only the beginning of West Bay, not of "Ascension Bay."

lands defining Monterey Bay that we cannot understand the Master's statement that "the resemblance is startling." There, the entrances to the bay were as clear as one could wish, pointing toward each other like pincers. Here, fixing the western boundary of the bay is such an arbitrary task that everyone is hesitant to risk a selection. The answer is that "Ascension Bay" is an artificial construction; in nature, it does not exist.

3. In conclusion, we stress a further objection to "Ascension Bay", related to its abnormal size. As we have noted, we do not believe "Ascension Bay" would satisfy the criteria of Article 7 even if, with the same configuration, it comprised a very much smaller area. But, that is all the more difficult, we submit, when it is remembered that we are considering a body of water with a mouth some 42 miles wide—in contrast to Monterey Bay with only a 13-mile mouth.

The Convention, it is true, recognizes overlarge bays without expressly imposing additional tests. But that is not dispositive. Presumably, everyone would agree that, at some point, the rules of Article 7 cease to apply because the water body considered has *too large* an opening to be considered a "bay," regardless of its "bay-like" configuration. That would include areas which geographers term "gulfs"—such as the Gulf of California and the Gulf of Campeche off the Mexican coast, and, indeed, the Gulf of Mexico itself. Also beyond the reach of Article 7 are bodies of water conventionally labeled "bays" on maps but far too large

to be so treated—for instance, the Bay of Biscay or the Bay of Bengal, both of which would easily satisfy the semicircle test.[33] We do not suggest that "Ascension Bay" is in this category. Yet, in our view, it is significant that we are dealing with an area which has an opening to the sea so much greater than the normal 24-mile maximum.

What we suggest is that, in such a case, the criteria of Article 7 should be more clearly satisfied. After all, the underlying principle is that a bay should be recognizable to the mariner as *inland* water. The wider its mouth, therefore, the more important other features that identify the area as a bay. At least once we pass the 24-mile limit, it is reasonable to expect plainly identifiable headlands and other indications that confirm the "landlocked" character of the area. See the testimony of Dr. Robert Hodgson, the Geographer of the State Department, Tr. pp. 5318, 5379–5384. Thus, one may concede that Hawke Bay in New Zealand, despite the comparable size of its mouth, is a true bay because of its very pronounced pinched headlands. But it would be impossible to make the same claim for "Ascension Bay."

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[33] We recognize that Article 7, by its own terms (Art. 7(1)), "relates only to bays the coasts of which belong to a single [national] State." But the fact that some of the water bodies listed wash the shores of several nations does not detract from our point. Thus, the Gulf of Mexico—although literally satisfying all the tests of Article 7—would not qualify as an overlarge bay even if all the countries bordering it were united into a single nation.

CONCLUSION

For the foregoing reasons, the Special Master's determinations with respect to East Bay, the specified low-tide elevations near Pass du Bois, and "Ascension Bay" should be rejected in favor of the submission of the United States for these areas, and, in all other respects, his Report should be confirmed.

Respectfully submitted.

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APPENDIX A

Article 7 of the Convention on the Territorial Sea and the Contiguous Zone, T.I.A.S. No. 5639, 15 U.S.T. (Pt. 2) 1606 (1958), provides:

> 1. This article relates only to bays the coasts of which belong to a single State.
>
> 2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.
>
> 3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.
>
> 4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

APPENDIX B

Part B of the Joint Pretrial Statement filed with the Special Master on December 5, 1969, provides:

> For the purposes of the present cross motions for entry of a second supplemental decree as to the State of Louisiana, the parties agree to accept the set of 54 maps filed with the Special Master as correct representations of the present high- and low-water lines, with the following exceptions:
>
> (a) The United States reserves the right to show that the spoil bank shown on Map 8 of 8 as extending westward from the northern headland of Pass Tante Phine has ceased to be above the level of mean low water;
>
> (b) The United States reserves the right to show that the mean low-water line west of Sandy Point Bay between 89°30′ W. and 89° 32′ W. differs from that shown on May 8 of 41;
>
> (c) Louisiana reserves the right to show that in the area from Pass Tante Phine running southerly to the vicinity of the mouth of Pass du Bois, in addition to the low-water lines reflected on Map 8 of 8, there are more seaward mean low-water lines marked on large scale charts officially recognized by the coastal state, which must be given effect in delimiting Louisiana's coast line;
>
> (d) Louisiana reserves the right to show that in the area of East Bay, seaward of the mean low-water line reflected on Map 4 of 8, in addition to said mean low-water line there is an additional mean low-water line configuration which is marked on official large scale charts officially recognized by the United States, and which should be given full effect by the Master;

(e) Louisiana reserves the right to show that islands or low-tide elevations exist south of the mouth of South Pass that were not reflected on Map 4 of 8;

(f) It is agreed that the y coordinate of the mudlump east of Pass a Loutre, shown on Map 2 of 8, La. Ex. 119 p. 9, as x=2,754,100, y=189,915, should be y=186,915.

This agreement to accept as correct the water lines shown on the set of 54 maps does not preclude the parties from introducing evidence, not inconsistent with those maps, of geological, physical, or other facts, including but not limited to water depths, inland portions of water lines left incomplete on the set of 54 maps, particularly inclusion of tributary waters in measurements for the semicircle test, and conditions that existed prior to the surveys on which the 54 maps were based. Also, the parties may show the history and usage of these areas. Neither will acceptance of the 54 maps for the purpose stated preclude the parties hereafter, on future motions for entry of further supplemental decrees to have only prospective effect, from showing changes from the conditions on the 54 maps. Neither does this agreement imply that the parties accept as correct the methods used in making the 54 maps.

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In the
Supreme Court of the United States
OCTOBER TERM, 1974

UNITED STATES OF AMERICA,
Plaintiff,
v.
STATE OF LOUISIANA, ET AL.,
Defendants.

EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF THE SPECIAL MASTER FILED JULY 31, 1974, AND BRIEF IN SUPPORT OF EXCEPTIONS

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SUMMARY

1. Louisiana takes six exceptions. Two relate to failure to recognize as historic bays East Bay, Caillou Bay and other indentations formed by the Mississippi River Delta. The other exceptions relate to juridical inland water claims.

2. The evidence is entirely uncontroverted, except as to a few technical oversights affecting juridical problems. Thus, Louisiana's exceptions almost entirely relate to errors of law, or misapplication of law to reach erroneous ultimate conclusions. The erroneous assumption that acts which may be done in the territorial sea can never prove an historic bay inland water claim, is an example of such an error treated in historic arguments. In the juridical rulings, in addition to many errors of law (e.g. failure to follow the Convention rule to follow the low-water mark in semi-circle test area measurement) there are also several mistaken applications of law. Thus, as to island-headland errors, the Report misinterpreted mere guidelines or factors so as to convert them incorrectly into cumulative strict requirements.

3. In summary of historic waters arguments, the uncontradicted evidence supports Louisiana's claims that all of the Mississippi Delta Bays, including East Bay and Caillou Bay are historic bays. This evidence shows exercise of authority over the controverted waters, continuing over a very long time, with acquiescence of foreign states, far more than for recognized historic bays. The waterbodies are all indentations and bay-like. The acts are therefore sufficient to show an inland claim. Even by the reasoning employed in the Report, many of the acts were sufficient to evidence an inland historic bay claim, but were denied such effect in erroneous ultimate conclusions of the Report. Such acts included: 4 arrests of foreign vessels; an American ambassador appearing in a

British Court in 1806 and making a coastline claim of territory to waters enclosed by river islands along the Louisiana coast; exclusion of foreigners by armed patrols with eye witness testimony on such patrols extending back to and before World War I; requiring foreigners to submit to state licensing and regulation as required for fishing in inland waters; and many other uncontroverted jurisdictional acts reviewed in these historic arguments. Louisiana maintains that these and other actions amounted to such a firm and continuing publicized stance, that they were, in effect, assertions of jurisdiction which the government cannot now deny in this domestic law suit. Misunderstanding or misapplication of law caused the negative conclusions of the Report. In addition, it was considered by the United States that East Bay was a juridical bay to its outermost headlands until at least 1918. It was recognized that the waters of Caillou Bay were inland waters until at least 1968.

4. As to the juridical exceptions, Louisiana argues in support of Exception 3 that all bay requirements for the more outward East Bay closing lines are met as required under the Convention, Article 7. Indeed, the Master agreed, as to all matters except area measurement where he used a method not supported by law. Louisiana's juridical arguments at East Bay are therefore principally directed to the point that the Convention system of area measurement for the semicircle test should be employed, not the more restrictive approach by the Master. The Convention system calls for use of the low-water line. This requires use

of bays within the bay or other tributaries and islands that the Master did not employ. Supplemental arguments are made to further show area measurement criteria are satisfied for the alternative closing lines claimed in East Bay. Incidental arguments relate to headland error and map and survey rules which govern time periods for which certain alternatives should be recognized if more outward claims are rejected.

5. Arguments supporting Exception 4, pertaining to island-headland problems, maintain that the Court's opinion, 394 U.S. 11, contemplated a realistic consideration of numerous factors. The opinion did *not* posit a cumulative, strict test which required that strong positive facts should be disregarded if a single minor, negative fact is found. We specially argue that this Court's pronouncements and important precedent on the great weight to accord the fluvial character and origin of islands were not correctly interpreted. We treat many erroneous conclusions as to particular island-headland problems affecting Bucket Bend Bay and other Mississippi Delta Bays, Caillou Bay and Atchafalaya Bay.

6. A few technical oversights are cumulated and treated in Exception 5. Even these errors principally relate to legal questions, e.g. the argument that a reasonably correct chart should control, but chart changes should not be given effect if they do not fairly reflect normal shoreline conditions or were obviously self-serving changes made to influence this litigation.

7. Louisiana argues in support of Exception 6 that Caillou Bay is juridically a bay, on the basis of

Isle Derniere forming part of the mainland. Important new evidence was presented to the Master, including evidence showing additional land largely closing water gaps shown on erroneous maps. Louisiana also argues it was materially prejudiced here by the federal change of position, because no surveys were made for the gaps between islands or on the bay side of the islands during the years the government recognized the bay. That federal position, it is argued, could not be changed, for reasons suggested in note 97, 394 U.S. 11. The Master agreed with Louisiana's basic positions, but was in error in holding that this Court's findings barred him from ruling in favor of Louisiana.

8. In conclusion, Louisiana argues that the many technical questions before this Court are of great importance to Louisiana, but are of minuscule significance to the Nation. Given the lion's share of offshore resources already, the federal government has unduly burdened this Court with three decades of Tidelands controversy. Never ending dispute over coast line details was not intended by Congress. Future controversy would be avoided by recognition of the lines described in Appendix III. Correct application of rules heretofore approved will reach that result.

No. 9, Original

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF LOUISIANA, ET AL.,

Defendants.

EXCEPTIONS OF THE STATE OF LOUISIANA TO THE REPORT OF THE SPECIAL MASTER FILED JULY 31, 1974, AND BRIEF IN SUPPORT OF EXCEPTIONS

EXCEPTIONS

The State of Louisiana takes the following exceptions to the determination by the Special Master that certain waters considered inland waters by Louisiana within its coastline are either territorial seas or high seas:

1. The State of Louisiana excepts to the Special Master's conclusion that although it is conceded that prior to 1918 East Bay qualified as a juridical bay and the acts of sovereignty exercised over the bay by Louisiana and the United States are undisputed, that, nevertheless, the waters of East Bay are not now historic inland waters, but are part of the territorial sea or high seas, notwithstanding his finding that

the facts presented by Louisiana are undisputed and must be taken as true.

2. The State of Louisiana further excepts to the Special Master's conclusions that the waters treated by Louisiana as inland historic waters in the remaining Mississippi River Delta and Caillou Bay are not now historic inland waters, but are part of the territorial sea or high seas, notwithstanding his finding that the facts presented by Louisiana are undisputed and must be taken as true.

3. The State of Louisiana further excepts to the Special Master's failure to find that the portions of East Bay seaward of Closing Lines C and D satisfy the semicircle test: alternatively, the Report did not reflect dates when closing lines seaward of Lines C and D ceased to satisfy the test after 1918.

4. The State of Louisiana further excepts to the Special Master's failure to correctly and fully use applicable legal criteria for treatment of islands as part of the mainland and for determination of natural entrance points of bays. These errors have caused the Special Master to fail to recognize more seaward closing lines for recognized juridical bays, including Bucket Bend Bay, Blind Bay, Garden Island-Red Fish Bay, and Atchafalaya Bay.

5. The State of Louisiana further excepts to the Special Master's errors affecting several cartographic and survey questions in the Mississippi Delta such as not giving full effect to pre-December 6, 1969 chart configuration and failing to correctly find the

times of the existence of certain islands, low-water elevations, or low-water areas.

6. The State of Louisiana further excepts to the Special Master's conclusion that although he finds that Caillou Bay is in fact a juridical bay, the decision of this Court precludes his so holding.

PRELIMINARY STATEMENT

Louisiana asserted ownership and sovereignty of the marginal sea along its coast from the inception of its statehood in 1812. This claim was placed in jeopardy after the decision in *United States v. California*, 332 U.S. 19 (California I), where this Court held that the United States , and not the several states, has full dominion over the resources of the seabed of the territorial sea. Louisiana's inland claim to the waters of the delta lying between and adjacent to the passes of the Mississippi River had never been disputed or questioned by foreign governments, nor was the claim disputed by the United States Government until the inception of this lawsuit in 1948. Report of Special Master, Finding of Fact No. 16, at 69 (hereinafter, Report).[1] In *United States v. Louisiana*, 339 U.S. 699 (Louisiana I), and *United States v. Texas*, 339 U.S. 707, this Court applied to Louisiana and Texas the same principle announced in California I. Shortly thereafter, Congress enacted the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 (1964 ed.), reaffirming title to all coastal states in the ownership of the seabed within three geographic miles of the coast and granting to the states along the Gulf the right to establish an historical offshore boundary not to exceed three leagues. The United States instituted suit against Lou-

[1] Louisiana's title to Caillou Bay as inland waters was first called into question by the United States in 1968 in this litigation. 394 U.S. 11, at 73 n. 97. See United States v. Louisiana, 363 U.S. 1, at 67 n. 108. The United States now takes the position that part of Caillou Bay, formerly recognized by the United States as inland waters of Louisiana up until 1968, is now "high seas."

isiana and subsequently joined Texas, Mississippi, Alabama and Florida to establish the measure of the offshore boundary of these states under the Submerged Lands Act. In *United States v. Louisiana*, 363 U.S. 1 (Louisiana II), this Court held that Louisiana had no historical boundary into the Gulf of Mexico, but was entitled to three geographic miles gulfward from its coastline. Jurisdiction was retained by the Court under a renumbered No. 9, Original to determine the coastline, fix the boundary and dispose of all other relevant matters. 364 U.S. 502.

Under the Submerged Lands Act the coast line of a state is defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 67 Stat. 29 §2(C).

Proceedings were filed in No. 9, Original by the United States against Louisiana to fix Louisiana's coastline from which to measure three geographic miles. The Court then, in *United States vs. Louisiana, et al.* (Louisiana III), 394 U.S. 11, laid down certain rules and precepts for the location of said coastline. Some of the precepts laid down by this Court were self-executing and others depended upon factual determinations. The matter was then referred to the Honorable Walter P. Armstrong, Jr., as Special Master, on May 19, 1969. 395 U.S. 901.

This Court determined first, in the case of *United States v. California*, 381 U.S. 139 (California II) that the definitions contained in the international Convention on the Territorial Sea and the Contiguous Zone,

ratified by the United States in 1961, [1964] 15 U.S.T. (pt. 2) 1607, T.I.A.S. No. 5639 (hereinafter, Convention), should be considered in determining inland waters as defined by the Submerged Lands Act. This same principle was to be applied in determining the coastline of Louisiana. It was recognized that the definitions in the Convention did not fit all of the factual situations involved in establishing Louisiana's coastline, including a definition of historic inland waters.

The only remaining issue now before the Court is the gulfward extent of Louisiana's inland waters from which to measure the rights received by Louisiana in the marginal sea under the Submerged Lands Act.[2] No dispute exists over Louisiana's title to its coastal inland waters which were acquired on its admission into the Union as a state in 1812 under doctrine recognized in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212. Principle reaffirmed in 363 U.S. 1, at 66 n. 108. In determining the line marking the seaward limit of Louisiana coastal inland waters, we are not dealing with rights acquired under the Submerged Lands Act, for those rights only commence from the line marking the seaward limits of inland waters.

[2] Large areas of Louisiana's coastline from which to measure Louisiana's marginal sea acquired under the Submerged Lands Act have already been fixed and established by agreement between the parties and decrees of this Court. A majority of the monies held in escrow by the United States under the Interim Agreement, resulting from oil, gas and mineral operations in the disputed areas, have been disbursed by decrees of this Court (decrees of December 13, 1965, 382 U.S. 288; December 20, 1971, 404 U.S. 388; and October 16, 1972, 409 U.S. 17). Most of the escrow money was paid to the United States under such decrees. Only a few areas of Louisiana's total coastline are still in dispute in this litigation.

The Special Master has now filed his report with the Court after holding numerous hearings. The transcript of these hearings occupy 46 volumes, containing a total of 6,444 pages. Louisiana offered 356 separate exhibits and the United States offered 419 separate exhibits.[3]

Each side was given adequate time by the Special Master to develop its various contentions. The exceptions filed by Louisiana to the Report of the Special Master are based primarily on erroneous conclusions drawn by him from undisputed facts, and his application of erroneous legal principles to some of these facts. Louisiana adopts many of the facts found by the Special Master, for they were made in most instances from undisputed evidence, and adopts many of his conclusions as our discussions in this memorandum will reveal.[4] Several exceptions relate to areas where the Special Master would have found enclosed inland waters after listening to the evidence, if the Special Master had not felt bound by certain language in the Court's opinion rendered prior to an evidentiary hearing and without the benefit of evidence produced before the Special Master. Louisiana urges in these areas the Special Master construed too narrowly the language of the Court. In any event the Court should make its final determination on the full record as made up after the evidentiary hearing before the Special Master. *Mississippi v. Arkansas*, ___U.S.___, 94 S.Ct. 1046, quoted note 18, *infra*.

[3] For the convenience of the Court, Louisiana files herein with this memorandum, as Appendix II, an index to the transcript and an index to all of the exhibits.

[4] See discussions *infra* of Ascension Bay and East Bay.

ARGUMENT

FIRST EXCEPTION

HISTORIC EAST BAY

The State of Louisiana excepts to the Special Master's conclusion that although it is conceded that prior to 1918 East Bay qualified as a juridical bay and the acts of sovereignty exercised over the bay by Louisiana and the United States are undisputed, that, nevertheless, the waters of East Bay are not now historic inland waters, but are part of the territorial sea or high seas, notwithstanding his finding that the facts presented by Louisiana are undisputed and must be taken as true.

EAST BAY IS AN HISTORIC BAY

East Bay, recognized from the earliest times as a bay on maps of the Mississippi Delta, lies between the two main passes of the Mississippi River. It is conceded by the parties to this litigation that East Bay was a juridical bay until at least 1918, to its outermost natural entrance points. Report, at 27.[5] In spite of this, the Master determined, as of the date of his Report, East Bay was not an historic bay nor any longer a juridical bay to its outermost natural headlands.

Criteria Fixed by the Court For Establishing an Historic Bay

Let us now first consider what this Court established as precepts to be followed by the Special Mas-

[5] This means the waters landward of the closing line were inland waters. Articles 5(1) and 7 of the Convention.

ter in considering Louisiana's historic inland water claims. The Court determined: (1) It would be inequitable in adapting principles of international law to resolve this domestic controversy to permit the United States to distort those principles in the name of its power over foreign policies and external affairs by denying any effect to past events. 394 U.S. 11, at 78. (2) That the only fair way to apply the Convention's recognition of historic bays to Louisiana's claim would be to treat the claim of historic waters as though it were being made by a national sovereign and opposed by another nation. 394 U.S. 11, at 77. (3) The Special Master should consider Louisiana's exercise of dominion as relevant to the evidence of historic title. 394 U.S. 11, at 78. (4) To the extent the United States could rely on state activities in advancing a claim to historic title they are relevant to the determination of Louisiana's historic title. 394 U.S. 11, at 76, 78. (5) While the United States is not required to take affirmative steps to add to its territory by drawing straight baselines,

> [i]t would be [unprecedented] to allow the United States to prevent recognition of a historic title which may already have ripened because of *past* events, but which is called into question for the first time in a domestic lawsuit. The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in *United States v. California.* See n. 97, *supra.* 394 U.S. 11, at 77 n. 104. [Emphasis by the Court].

(6) Historic bays are not defined in the Convention, but their definition stems from general principles of

international law. Thus, while there is no universal accord on the exact meaning of historic waters, there is substantial agreement on the outline of the doctrine and on the type of showing which a coastal nation must make. *United States v. Louisiana*, 394 U.S. 11, at 74-75.

The Court referred to the Juridical Regime of Historic Waters, Including Historic Bays (hereinafter, *Juridical Regime*) as a guide in determining whether a bay was an historic bay under international law.[6] These criteria are as follows:

> "There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States. First, the State must exercise authority over the area in question in order to acquire a historic title to it. Secondly, such exercise of authority must have continued for a considerable time; indeed it must have developed into a usage. More controversial is the third factor, the position which the foreign States may have taken towards this exercise of authority. Some writers assert that the acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by

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[6] The Court also referred to the REGIME OF BAYS IN INTERNATIONAL LAW (1964) by Dr. Leo Bouchez. Dr. Bouchez was recognized by the Court as an authority on historic inland waters. See United States v. Louisiana, 394 U.S. 11, at 22 n. 23, 23 n. 27, 27 n. 31, 76 n. 103.

these States is sufficient." Juridical Regime of Historic Waters, Including Historic Bays, [1962] 2 Y.B. Int'l L. Comm'n 1, 13, U.N. Doc. A/CN. 4/143 (1962). 394 U.S. 11, at 23-24 n. 27.

Louisiana followed these precepts in developing its case before the Special Master. Louisiana's first exception is based on the fact that the Special Master failed to follow these precepts announced by the Court in making his determination that East Bay is not an historic bay.

The Special Master Found the Evidenc Introduced by Louisiana on its Historic Bay Claims was Uncontradicted and Must be Taken as True

East Bay is surrounded by land of Louisiana except for its opening in the Gulf of Mexico, and it is undisputed that since the mid-1800's there have been settlements along East Bay's shores, including Port Eads, Pilot Station, Burrwood (and before that, Pilot's Lookout and Custom House on the shores of East Bay) and Pilottown near the head of the bay. Additionally, the Coast Guard has maintained stations at each side of the mouth of the bay.[7] It is only natural that East Bay was considered a juridical bay from the earliest times. We emphasize the Special Master found that it was conceded by both the United States and Louisiana that East Bay was a juridical bay until at least 1918. Report, at 27. We are here dealing with a sizeable body of enclosed waters long recognized as inland waters, a large portion of which the United States now argues

[7] Dr. Morgan, tr. 193, 194; La. Exhs. 8, 159 and 169.

is open sea.[8] There is no finding by the Special Master when East Bay ceased to be a juridical bay after 1918, if it did, although the Special Master did find, influenced by this Court's ruling, that East Bay is not now a juridical bay to its outermost natural headlands. Report, at 29.[9] The Special Master determined that East Bay was not an historic bay, Report, at 22, even though the Master made findings of fact from the uncontradicted evidence introduced by Louisiana as to certain acts of sovereignty exercised over East Bay by Louisiana as follows:

1. Title to Louisiana's coastal inland waters

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[8] In 1918, when it is agreed that East Bay was a juridical bay, it contained inland waters shoreward of its closing line of 31,588 acres or more than 7,000 acres in excess of that required by the semicircle test. See Appendix I, Fig. 1, at 134.

[9] Without having all of the facts and on a motion for judgment, this Court stated: "Since East Bay does not meet the semicircle test on a closing line between its seawardmost headlands—the tip of the jetty at Southwest Pass and the southern end of South Pass—it does not qualify as a bay under Article 7 of the Convention on the Territorial Sea and the Contiguous Zone." 394 U.S. 11, at 53. The Court then went on to find, in substance, that an indentation which does not satisfy the semicircle test is not a bay, but open sea. When these statements were made the Court did not have before it the evidence that has now been presented to the Special Master, nor the fact that both parties concede that East Bay was a juridical bay until at least 1918. This statement did not apply to Louisiana's historic claim referred to the Special Master to make a determination in the first instance. The Special Master felt bound by the above statements of the Court to restrict tributary waters in determining the semicircle test. For a further discussion of this issue, see pages 77-92 *infra*.

passed to the State in 1812 by virtue of its act of admission to the Union. While the United States retained title to all public lands, title to navigable inland water-bodies, including bays, vested in the State of Louisiana upon its admission. This title was confirmed to Louisiana under the doctrine recognized in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). (See 363 U.S. 1, 66 (1960) n. 108.)

2. Commencing in 1870, Louisiana enacted legislation to regulate oyster fishing in its coastal bays.

3. Since 1886 Louisiana has legislatively reaffirmed its title to bays along its coast, including those in the delta. (Acts of 1886, 1892, 1902, 1904, and 1910).

4. Louisiana has granted oyster leases in the shallow waters of many Mississippi delta bays subsequent to the above legislation.

5. Statutes regulating shrimping in Louisiana have defined the inside waters of the delta area (to which stringent closed season laws have applied) as follows:

Act 103 of 1926:

> All. . .bays and sounds found along the Louisiana Coast of the Gulf of Mexico.

Act 143 of 1942:

> All. . .bays and sounds along the Louisiana coast, and all other waters in and contiguous to the Gulf of Mexico *whether or not partly enclosed by* islands, sand [s]pits,

marshes, or *delta fingers*, wherein the water is less than three (3) fathoms in depth.

Act 51 of 1948:

The inside waters shall include . . . Breton Sound, . . . Blind Bay, Garden Island Bay, East Bay, West Bay . . . and all other bays and sounds along the Louisiana coast. . . .

6. Since the early 1900s the Louisiana Wild Life and Fisheries Commission and its predecessor agency, the Department of Conservation, have from time to time used a system of boat and aircraft patrol in which imaginary lines joining outermost mudlumps and other features marking the seaward terminus of the passes have been utilized to determine a belt of waters lying three miles from such lines for purposes of such patrol.

7. . . . arrests have been made and fines levied against persons violating Louisiana's statutes inside the areas of the delta described above, regardless of nationality. . . .

8. In patrolling Louisiana's coastal inland waters, enforcement agents of the Conservation Department and the Wild Life and Fisheries Commission have used armed vessels or have themselves been armed and have used armed force to arrest violators of Louisiana's laws.

9. Both United States citizens and foreign nationals, including Japanese, Chinese, Filipino, Mexican, and Spanish fishermen, have

been required to obtain Louisiana licenses to fish in Louisiana waters.

10. Licenses of fishermen fishing in Louisiana waters have been checked by Wild Life and Fisheries enforcement personnel without regard to nationality.

11. Regardless of nationality, persons caught fishing without a license within Louisiana waters or three miles seaward from the mouth of any bay . . . have been arrested and have had charges filed against them by Louisiana enforcement officers.

12. About 1946, personnel on three Mexican fishing vessels were arrested by an aerial law enforcement agent for the Wild Life and Fisheries Commission for violating the closed shrimping season in East Bay. These arrests were made outside of a 3-mile belt from the shore and inside the East Bay closure claimed by Louisiana.

13. Louisiana enacted Act 68 of 1932, Act 367 of 1940, Act 385 of 1948, and Act 386 of 1948 to prevent pollution of State waters.

14. Enforcement agents of the Wild Life and Fisheries Commission have conducted pollution control activities in East Bay consistent with Louisiana pollution control statutes and have issued citations for failure to comply with these regulations.

15. Louisiana issued mineral leases under Act 30 of 1915 as amended by Act 315 of 1926 covering most of the Mississippi delta bays prior to issuance of the Truman Proclamation in

1945. These included Mineral Lease 192 in 1928 covering West Bay and East Bay, Mineral Lease 195 in 1928 covering Grand Bay, Grand Coquille Bay and many other bays to the north of the delta contiguous with Breton Sound, and Mineral Lease 335 in 1935 covering Paddy Bay, Bull Bay, Delta Bend, Quarantine Bay, Breton Sound and Chandeleur Sound. Portions of these leases remain active.

16. Louisiana's claim to waters of the delta lying between and adjacent to the passes of the Mississippi River has never been disputed or questioned by foreign governments, nor was the claim disputed by the United States government until the inception of this lawsuit in 1948. Report, Findings of Fact, at 67-69.[10]

There Were Other Acts of Sovereignty and Jurisdiction Exercised over East Bay By Louisiana and the United States to Which Weight Was Not Given

Louisiana did not urge before the Special Master that the United States had adopted straight baselines under Article 4 of the Convention, for the Convention

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[10] The Special Master submitted to counsel a preliminary report to which Louisiana filed a *Motion to Clarify, Amend and Supplement Findings of Fact and Conclusions of Law*, a copy of which motion is made Appendix I to this brief. The Master's findings of fact in Appendix B to his report, the recognition that East Bay was a juridical bay until at least 1918, and the findings that Caillou Bay is a juridical bay resulted from a hearing before the Master on this motion. For a more detailed discussion of the characteristics of East Bay and the evidence on which the Special Master made the above findings, see Appendix I, to this brief, at 129-172.

was only approved by the United States in 1961. Louisiana's title to East Bay as an historic bay had ripened long before the adoption of the Convention.

As added support of Louisiana's historic bay claim, the evidence established the United States took actions by setting aside certain areas of water, including East Bay, in which it had a particular interest, and exercised acts of sovereignty over these areas. These actions should have been considered by the Special Master along with the other acts of sovereignty exercised over East Bay by the United States and Louisiana. Louisiana did not urge to the Special Master that the inland water line[11] established inland waters by itself, for this Court has already held that such is not the case, [12] but left open the question of whether or not this regulation of navigation could be considered along with other acts in establishing historic inland waters. The Special Master gave no effect to the inland water line as a factor to be considered along with other acts of sovereignty to establish historic inland water. Report, at 9.

Louisiana urged that certain charts attached to the opinion of this Court in *Louisiana v. Mississippi*,[13] should likewise be considered as an assertion of sovereignty over the area outlined in the charts. The Special Master refused to give any weight to these charts. Report, at 10-11.[14]

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[11] Act of February 19, 1895, 28 Stat. 692.

[12] 394 U.S. 11, at 21-22.

[13] 202 U.S. 1.

[14] The charts showing the delta inland waters have been

The United States enclosed the Delta, including East Bay, in 1936, fixing the area to take the census of the United States. The Special Master failed to give any weight to this indication of Louisiana's coastline by a Department of the United States Government.[15] Report, at 11.

The United States, by proclamation of President Theodore Roosevelt in 1907, designated an area surrounding the Mississippi Delta as Tern Islands Reservation. This area was patrolled and the birds were protected. The Special Master failed to give any weight to this assertion of sovereignty by United States in establishing Louisiana's historic water claims. Report, at 11-13.[16]

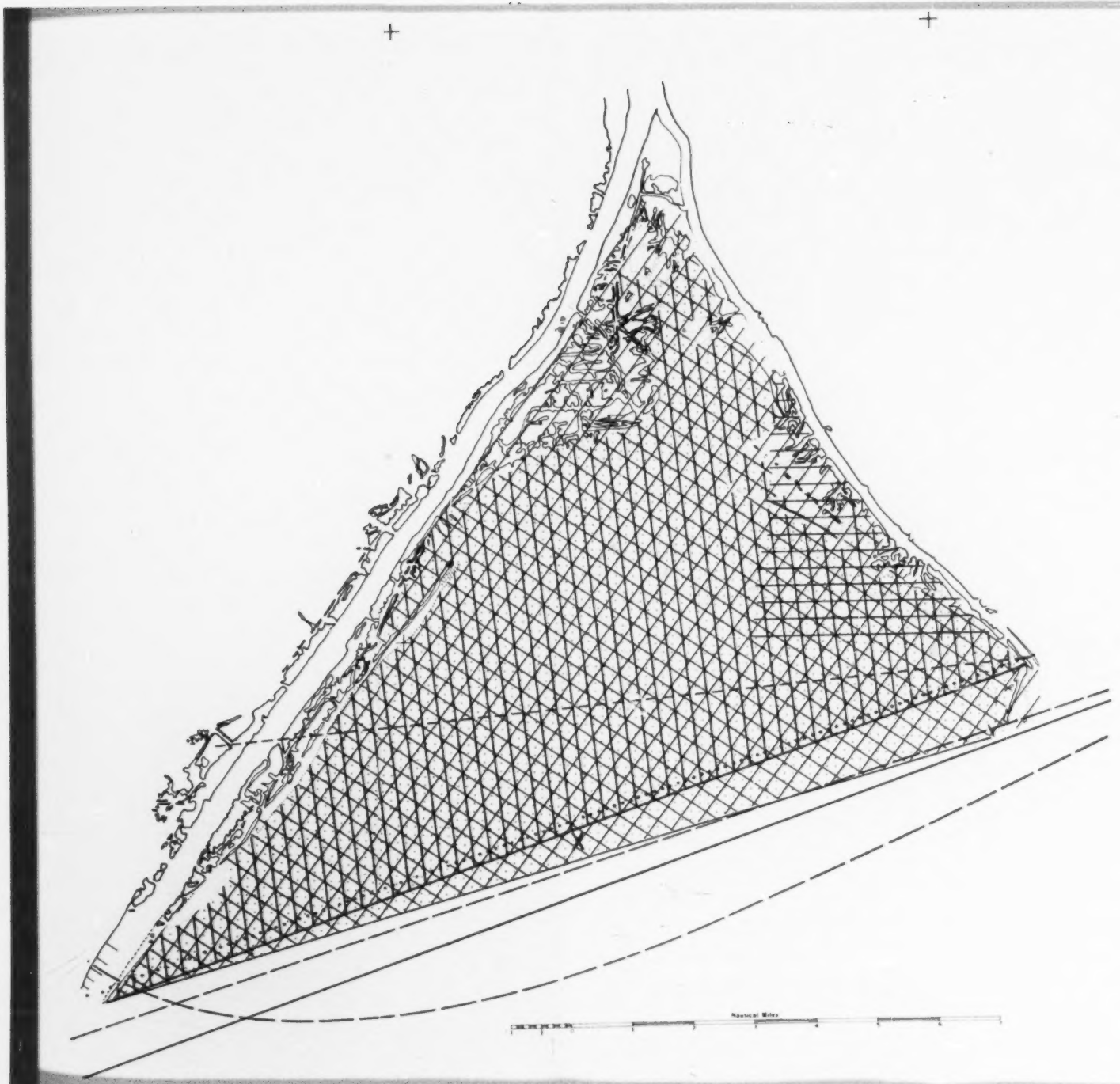
Even though none of these acts of sovereignty, considered alone, may be sufficient to establish inland waters, they should have been given serious weight by the Special Master, (where East Bay was a juridical bay until at least 1918) along with the other uncontradicted evidence of sovereignty exercised by Louisiana over East Bay as shown by the findings of fact of the Special Master in Appendix B to his report.

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published in the reports of cases by the U.S. Supreme Court since 1906.

[15] See Proudfoot, MEASUREMENT OF GEOGRAPHIC AREA at 33, U. S. Dept. of Commerce (1946). This publication showed East Bay as a juridical bay in 1946.

[16] For a detailed discussion of the Inland Water Line, charts in the Louisiana v. Mississippi case, the charts of the Department of Commerce for measuring the United States to take the census thereof, and Tern Islands Reservation see Appendix I to this brief.



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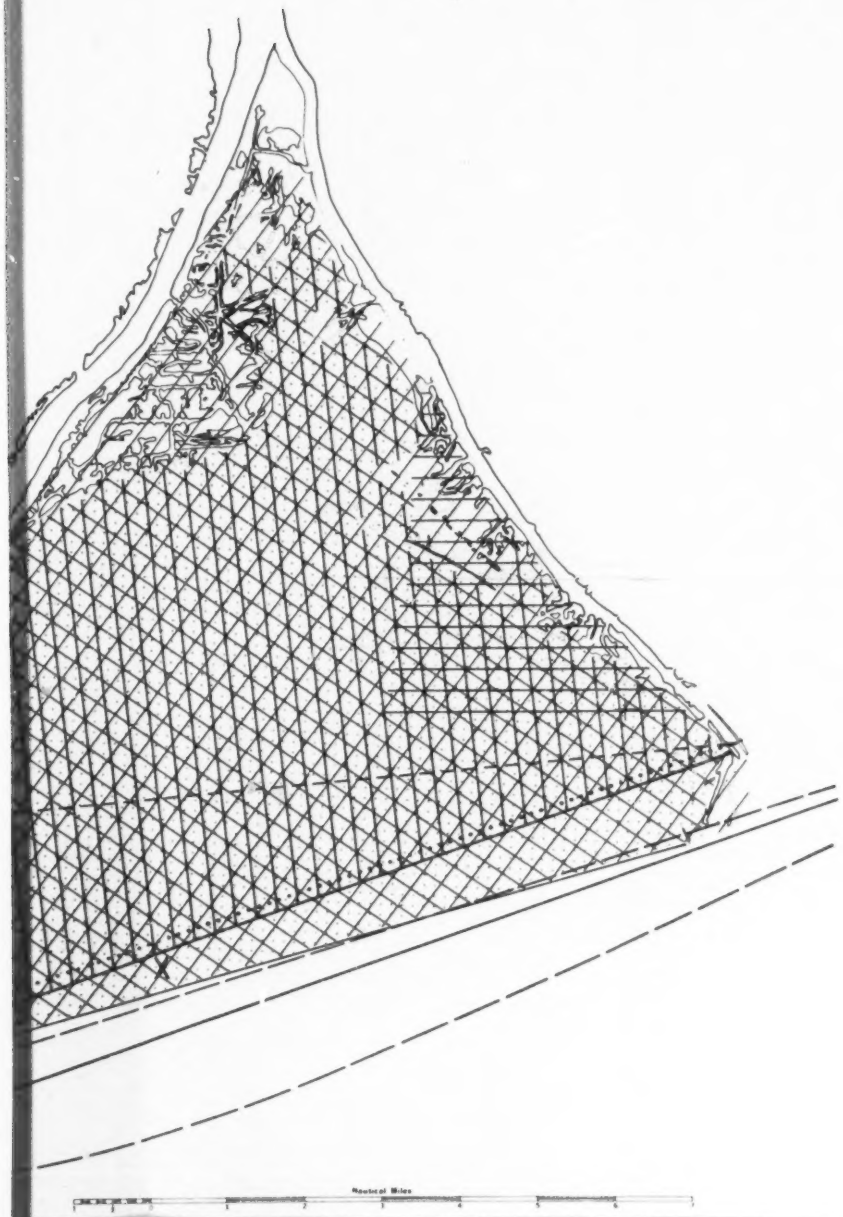
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EAST BAY

STRAIGHT BASELINES AND OTHER JURISDICTIONAL ACTS*

FEDERAL:

= Census Bureau measurement of area of United States and Louisiana for 1940 Census, still recognized in 1968. See e.g. La. Exh. 52 and 285.

Lines described on charts or other publications to show inland waters designated by:

---- = 1895-1907--Secretaries of Treasury and Commerce and Labor
..... = 1911--Secretary of Commerce and Labor
— — = 1917--Secretary of Commerce
——— = 1927-32--Secretary of Commerce
See e.g. La. Exh. 51, 98 and 285.

— — = Tern Island Bird Reservation boundary, declared by President Roosevelt in 1907 and in force until early 1950's. See e.g. La. Exh. 28 and 285.

STATE:

= Oyster leasing zone (scores of smaller oyster leases granted commencing 1904 and probably continuing into 1940's). See e.g. La. Exh. 55 (items 19 through 164), 67 and 68.

= Mineral leases (full extent not shown) covering East Bay, granted 1928 through 1940's, some still in force. See e.g. La. Exh. 58 (especially item 57) and 95.

= Wildlife and Fisheries enforcement activity 1919 to present. See e.g. La. Exh. 55 (particularly items 194, 195 and 198).

X = Locale of arrest of several foreign fishing vessels, circa 1947. See La. Exh. 8 for exact location by Joseph Billiot.

= Area of exclusive Louisiana fishing activity, except for fishing conducted by Japanese circa early 1930's to 1941 in recognition of Louisiana authority by license. See e.g. La. Exh. 55 (items 19[illegible] through 197).

*See text for numerous additional lines

The attached Plate I is a composite visual explanation of some of the acts of sovereignty exercised by Louisiana and the United States over East Bay as established by the evidence.

Many of the acts of sovereignty, as found by the Special Master, commenced prior to 1918 when the waters of East Bay were conceded to be inland waters; such acts continued up to the present time. The assertion of these acts and others after 1918 is clear evidence, announcing to the world, Louisiana still considered the waters of East Bay inland. Louisiana's assertion of ownership and sovereignty after 1918 maintained Louisiana's title to East Bay as an historic inland water bay, even assuming, for purpose of argument, East Bay failed after that time to meet the test as a juridical bay. Louisiana's title to East Bay was not questioned by the United States until 1948 as found by the Special Master. Louisiana's title to East Bay was vested by past events both as a juridical bay and an historic bay before 1948. The United States cannot now, as cautioned by the Court, prevent recognition of East Bay as an historic bay.

The Principle Established by the United States that when a Bay formed part of the Interior of the United States, It is Deemed to Continue a Part Thereof, Should be Recognized

The United States argues before this Court, in its exceptions to Judge Maris' report as Special Master in *United States v. Florida*, No. 52 Original, and in their petition for writ of certiorari to this Court in the case

of *United States v. Alaska*, No. 73-1888, that the United States has consistently discouraged coastal states from extending their jurisdiction into areas previously regarded as high seas. This argument is not valid in this case, for here the United States is arguing that areas which were concededly inland waters at one time are now part of the open sea. There is no evidence in the record that the United States has ever taken a position in its international relations that East Bay was not inland waters of Louisiana before Louisiana's title was placed in jeopardy in 1948.[17]

The Special Master, in his preliminary report, to which the Motion to Clarify, Amend and Supplement the Findings of Fact and Conclusions of Law was filed by Louisiana (Appendix I), determined that East Bay is not an historic bay. The comments appearing in the Report filed by the Special Master with the Court appearing at pages 19-21 are substantially the same as those contained in the preliminary report. These were stated prior to the findings of fact contained in Appendix B to the Master's report and to the findings by the Special Master that it was conceded that East Bay was a juridical bay up until at least 1918. The fact that East Bay was a juridical bay until at least 1918 is a recognition that the acts of sovereignty performed by Louisiana up until at least that date were such as were exercised over inland waters. The later findings of fact, as shown in Appendix B to the Master's Report,

[17] We have been unable to find in our research any case where a nation has acknowledged that an area as large as East Bay, which once was inland water, is now open sea.

differ to some extent with the findings in the body of the Report. Appendix B to the Report explains and amplifies the acts stated in the body of the Report. There is nothing in the Special Master's Report indicating he gave any weight to the admitted fact that East Bay was a juridical bay containing inland waters until at least 1918. This strengthens the reason the Court should make its determination based on the total record.[18]

Recognition of East Bay's long-standing status as a juridical bay is very material. It adds strength to Louisiana's claim that even though East Bay may have lost its status as a juridical bay, nevertheless, it continued as an historic bay. Under the principle urged by the United States at the Hague Conference in 1930 and recognized as the United States' position in the U. N. Conference on the Law of the Sea which led to the 1958 Convention on the Territorial Sea and the Contiguous Zone, it was the United States' position that waters forming part of the interior waters of the United States are deemed to continue a part thereof.

> Waters, whether called bays, sounds, straits, or by some other name, which have been under the jurisdiction of the coastal state as part of its

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[18] This Court in considering a Report of a Special Master in an original action decides the case "upon [its] own consideration and . . . independent review of the entire record, of the report filed by the Special Master, of the exceptions filed thereto, and of the argument thereon. . . ." Mississippi v. Arkansas, ____U.S.____, 94 S.Ct. 1046, at 1049.

interior waters, are deemed to continue as part thereof.[19]

This principle was recognized by Dr. Henkin in his testimony as an expert for the United States in this case where he said:

> But if you might have started even with a geographic bay but in fact as a result of change it ceased to be one but you continued to assert rights in those bays, and other people continued to recognize them, then you might have moved from, if you will, a geographic to an historic bay. Dr. Henkin, tr. 4913.

There is no Legal or Factual Basis to Support a Finding That East Bay is an Historic "Territorial" Bay Rather than Inland Waters

Faced with the acknowledged fact that East Bay was a juridical bay until at least 1918, and with the uncontradicted evidence introduced in these proceedings of acts of sovereignty exercised by Louisiana and the United States over East Bay, the United States advanced the unsound argument that there are two kinds of historic bays, one being an historic territorial bay and the other being an historic inland water bay. This unsupported theory was adopted by the Special Master

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[19] Statement of Mr. Miller, the representative of the United States of America, at the Hague Conference on the Codification of International Law in 1930 quoted as a part of the United States position under the approved heading, "Scope of the Theory of Historic Bays," in the Preparatory Documents, Vol. I, Official Records U. N. Conference on the Law of the Sea 1958, U.N. Doc. A/CONF. 13/37, at 37. See testimony of Dr. Bouchez, tr. 957-66.

in his finding that East Bay is an historical territorial bay. The difference in the two types of bays, as argued by the United States and found by the Master, is that in one, foreign nationals had the right of innocent passage, whereas in the other type of bay, foreign nationals had no right of innocent passage. By holding the waters in East Bay territorial instead of inland, Louisiana is deprived of title to the bed of East Bay, which it had owned for more than one hundred years. The Master adopted this argument of the United States in spite of the fact that he found Louisiana had been enforcing its game and fishing laws by armed vessels in East Bay from at least 1900 against residents and foreign nationals alike. To give credence to this argument by the United States as adopted by the Master, it must be found that Louisiana ceased to treat the waters of East Bay as inland waters after 1918. The evidence is just to the contrary.

There is no basis in international law for this distinction advanced by the United States and adopted by the Special Master. This is particularly true as it applies to East Bay, admittedly once a juridical bay.

Professor Yehuda Z. Blum, in his treatises entitled *Historic Titles in International Law*, at 299-300 (1965), in discussing the fact that the waters of historic bays are internal waters, had this to say:

> Article 4 of the Draft Convention prepared by Schucking for the 1930 Hague Codification Conference—as amended following the discussions held in the Committee of Experts appointed by the Assembly of the League of Nations in 1924—

expressly provides that the waters of bays, as defined in that article (i.e. bays bordered by a single State, where the distance between the two shores does not exceed ten marine miles, "unless a greater distance has been established by continuous and immemorial usage") are to be assimilated to internal waters. Likewise, Article 7, paragraph 4, of the *Territorial Sea Convention* stipulates that the waters enclosed by a baseline drawn across the entrance of a bay, the width of which does not exceed twenty-four miles, "shall be considered as internal waters." Although paragraph 6 of the same article expressly excludes historic bays from the scope of the provisions of this article, it is clearly understood that the intention of this stipulation was to recognize some departure from the restrictive rules envisaged for ordinary bays, the entrance of which—if claimed as territorial bays—could not exceed a certain width. This question does not arise in respect of historic bays.

It may therefore be confidently assumed that this provision is not meant to indicate any distinction between the legal regime of the waters of ordinary bays, recognized as territorial bays, and the regime accorded to historic bays. Both categories of bays are to be regarded as internal waters.

The theory advanced by the United States that the waters of East Bay are part of the territorial sea instead of inland waters is likewise disputed by the Convention. The rules of Article 7 of the Convention, it will be noted, are prescribed solely for the purpose of defining the baseline for the measurement of the territorial sea across the mouths of or within bays, and

that the waters inside that line are inland waters. Accordingly, the only sensible meaning of Section 6 of Article 7 (the exception of historic bays) is that a baseline drawn across the entrance of historic bays encloses inland waters. Thus, in the document, *Historic Bays*, Memorandum of the Secretariat of the United Nations, Document A/CONF. 13/1, one of the United States' own exhibits in the case (Exh. 97), we find:

> "It is always necessary to remember, in dealing with 'historic waters,' the essential point that those waters are internal waters. This fact explains many aspects which would be otherwise difficult to grasp. The theory was originally evolved to apply to 'bays,' and is still referred to as the theory of 'historic bays,' because it was never envisaged that it might apply except in areas which, by reason of their configuration, are generally not used as major international routes of transit;..." Historic Bays 117. (See also Juridical Regime 163 wherein it is stated that the dominant opinion is that historic bays are internal waters.)[20]

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[20] "It has long been part of international law that, on a basis of long-continued user and treatment as part of the coastal domain, waters which would not otherwise have that character may be claimed as territorial or as internal waters—usually the latter, because, in practice, the doctrine has hitherto been applied mainly to 'historic bays' i.e., by permitting a closing line irrespective of length to be drawn across the entrance to certain bays respecting which a historic claim could be substantiated, *thus converting the entire waters of the bay into internal or national waters.* The Court in the Fisheries case defined historic waters as follows

McDougal and Burke, in their recognized authority, *The Public Order of the Oceans*, at 340, (1962), in commenting on historic bays, had this to say:

> Turning now to policy with respect to historic bays, the most general question is that of identifying the conditions which create general expectations that the waters of a bay are within the territory of a state *to the same extent as the adjoining land masses.* The primary factors for community policy relate to the patterns of practice which are advanced to support the notion of a prior assertion of authority and to the conditions which may be said to characterize acquiescence in such a claim by other states.
>
> Although writers and experts in codification place great emphasis and importance on the usage, or practices, of a coastal state in exercise of authority over a bay, it is not here suggested that a coastal state's expectation about its authority over a bay must be unequivocally manifested by an explicit claim that the bay is considered within internal waters. *Control of fisheries, imposition of administrative regulations upon foreign vessels, legislative enactments and local judicial decisions affecting foreign vessels all may serve to indicate the local belief that the bay is a part of state territory.* Similarly the element of acquiescence should

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(I.C.J., 1951, p. 130): 'By "historic waters" are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title'." The British Year Book of International Law 1954, Thirty-first year of Issue, The Law and Procedure of the International Court of Justice, 1951-54, by Sir Gerald Fitzmaurice, at page 381. [Emphasis added].

> not be regarded technically; *lack of protest by interested states even to equivocal practices*, the general assumptions of writers over a period of time, and the response of decision-makers both national and international would appear sufficient indication of concurrence with the coastal expectation to establish evidence of a community expectation. [Emphasis added].

On the basis of the above authorities, having found that the acts of sovereignty exercised by Louisiana over East Bay were sufficient, at least, to establish the waters as part of the territorial sea, the Special Master should have determined that the waters of East Bay are *historic inland waters.*

The Master's determination that assertions of sovereignty by Louisiana established the waters as part of the territorial sea and are not probative of historic inland waters is apparently based upon a misunderstanding of a certain facet of this Court's opinion in Louisiana III relating to rejection of the historic *waters* claim of Louisiana based solely on the Inland Water Line designated under the Act of 1895.[21] The importance of statements of the Court on this subject lies not in any erroneous implication that jurisdictional acts which may be done both in territorial and in inland waters are not probative of an historic inland *bay* claim; for no such legal rule was presented in the portion of the Court's opinion discussing "historic and inland waters." The only agreed rules for historic bay determination given by the Court, for

[21] Act of February 19, 1895, 28 Stat. 692.

which it found substantial accord, were referred to in notes 102 and 104. See 394 U.S. 11, at 23 n. 27; cross-referenced at 75 n. 102.

> These factors are: (1) The exercise of authority... (2) the continuity of this exercise... (3) the attitude of foreign states. 394 U.S. 11, at 23 n. 27.

It is true, the Court indicated other considerations in notes 28 and 30, by way of *obiter*, in the context of dealing with Louisiana's historic *waters* claim based on the Act of 1895. We emphasize the word *waters* to show that the relevancy of the Court's remarks in notes 28 and 30 (394 U.S. 11, at 24, 26), about matters for which there was a want of accord, was further lessened by the context. The context was not a discussion of historic *bay* claims, but of the broad historic *waters* claim based upon the former Inland Water Line position or Coast Guard Line argument which was an historic waters contention, and, included waters seaward of bays, *not an historic bay contention.* Notes 28 and 30, 394 U.S. 11, at 24, 26 both quoted *Juridical Regime.* Note 28 reads:

> Historic title can be obtained over territorial as well as inland waters, depending on the kind of jurisdiction exercised over the area. "If the claimant State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over the territorial sea, the area would be territorial sea." Juridical Regime of Historic Waters Including Historic Bays, *supra*, n. 27, at 23.

Note 30 reads:

> The recent United Nations study of the concept of historic waters concluded that "if the claimant State *allowed the innocent* passage of foreign ships through the waters claimed, it could not acquire an historic title to these waters as internal waters, only as territorial sea." Juridical Regime of Historic Waters, Including Historic Bays, *supra*, n. 27, at 23. Under that test, since the United States has not claimed the right to exclude foreign vessels from within the "Inland Water Line," that line could at most enclose historic territorial waters. [Emphasis added].

The material referred to as being at page 23 is found in the typed copy of the *Juridical Regime* document at page 66, U.S. Exh. 99, paragraph 164. Paragraph 163 had stated the general proposition that as to historic bays, the coast of which belong to a single state, the waters were internal waters and that the territorial waters commence outside that line.

> . . . [T]he dominant opinion, as gathered from the statements assembled in the memorandum, seems to be that "historic bays" the coasts of which belong to a single State are *internal waters*. [Emphasis added].

Paragraph 165 at page 67 of the document, *Juridical Regime*, U. S. Exh. 99, made plain that the principles quoted in notes 28 and 30 of this Court's opinion, page 66 of U.S. Exh. 99, are reconciled with paragraph 163's statement by pointing out *that the*

territorial waters classification can only appertain to *waters* and not to *bays.*

This paragraph 165 reads as follows:

> In the latter case, [referring to historic waters that are part of the territorial sea rather than inland in character] it would be preferable not to speak of an "historic bay" but of "historic waters" of some other kind.

The terms *waters* and *bays* were employed quite advisedly according to their context in the text of the Court's opinion. Thus, when an indentation sufficient to be deemed a *bay* is the situs of the act, the act *coupled with the geography* shows the inland nature of the sovereignty asserted.[22] It has been decided that the waters claimed by Louisiana in the Mississippi Delta on historic grounds, (and this is especially true of East Bay), have a configuration sufficient to characterize them as historic bays.

> We do not pass on this contention except to note that, by the terms of the Convention, historic bays need not conform to the normal geographic tests and therefore need not be true bays. How unlike a true bay a body of water can be and still qualify as a *historic bay* we need not decide, for all of the areas of the Mississippi River Delta which Louisiana claims to be historic inland

[22] This is the reason the drafters of the Convention, in preparing Article 7, used a closing line between the headlands of a bay to enclose inland waters instead of measuring from the low water within the bay. Where a bay is an historic bay, the waters behind the closing line are inland waters, not part inland and part territorial.

> waters are indentations sufficiently resembling bays that they would clearly *qualify under Article 7 (6) if historic title can be proved. United States v. Louisiana*, 394 U.S. 11, at 75 n. 100. [Emphasis added].

There was no evidence introduced in the record that foreign nationals were permitted innocent passage in East Bay. To the contrary, the evidence, as found by the Special Master, establishes that Louisiana used armed vessels to require foreign nationals to secure fishing licenses to fish in East Bay and that foreign nationals were required to abide by Louisiana's fishing laws and regulations. Somehow, the federal arguments concerning innocent passage have perverted the meaning of what was done in the document *Juridical Regime*, changing a rule that permitting innocent passage shows merely territorial intent into a false rule that only acts actually expelling foreigners physically are probative of an inland intent. The United States has failed to cite any authority for such a rule.[23] There is no occasion for innocent passage within East Bay, for innocent passage relates to routes which connect parts of the high seas, not entrances to inland waters nor inland waters themselves.

The United States urged in the *Alaskan* case, that the waters in Cook Inlet were territorial waters instead of historic inland waters. The U. S. District Court found that the United States, and later the State of Alaska, regulated fishing in Cook Inlet and

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[23] Moreover, Louisiana did expel foreigners.

on this evidence found Cook Inlet was an historic bay and the waters therein were necessarily inland, thereby rejecting the same argument advanced by the United States and adopted by the Special Master in this case. This holding by the District Court was affirmed by the United States Ninth Circuit Court of Appeals.[24]

The evidence on Louisiana's historic bay claim is more substantial than that in the *Alaskan* case on which the Court found Cook Inlet was an historic bay necessarily containing inland waters landward of the closing line between its two headlands.

On the urging of the United States, the Special Master held that the only test to be applied in assessing what acts of sovereignty over a bay establish an historic bay as inland waters instead of territorial waters, were acts which interfere with the right of innocent passage of foreign vessels. It was on this premise that the Special Master determined

> The regulation of fishing within the territorial seas off the coast of the States to the extent that it does not conflict with federal law has long been recognized. See *Manchester v. Massachusetts*, 139 U.S. 240 (1891); *Skiriotes v. Florida*, 313 U.S. 69 (1941); *Toomer v. Witsell*, 334 U.S. 385 (1948). Report, at 20.

Unfortunately, the Special Master failed, in adopt-

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[24] United States v. Alaska, 352 F.Supp. 815, affirmed by United States Court of Appeals, 9th Circuit 497 F.2d 1155 (1974). Application is now pending before this Court by the United States for writ of certiorari under No. 73-1888.

ing the reasoning advanced by the United States, to give effect to Louisiana's enforcement of its fishing and game laws against foreign nationals in East Bay and the other bays along the Louisiana coast. The United States does not permit unauthorized foreign nationals to fish in inland waters or the three-mile territorial sea. When Louisiana enforced its game and fishing laws against foreign nationals in East Bay, it was asserting acts of sovereignty over the total of East Bay and three miles gulfward from the closing line of East Bay. It has been recognized in international law, as we will demonstrate, that the enforcement for a long period of time by a nation of its fishing laws in a bay against foreign nationals is sufficient to create historic inland waters even though the bay does not qualify as a juridical bay.[25]

The Court has already held the United States could urge acts of sovereignty exercised by Louisiana in establishing inland waters. Where Louisiana's title to East Bay as an historic bay had ripened in 1948 by past events, the United States cannot now disavow East Bay as an historic bay to the prejudice of Louisiana. The cases cited by the Special Master, mentioned above, relate to a state enforcing its laws against its own citizens. We do not question the rulings in those cases. Those cases did not deal with the question of a state enforcing its laws in a bay against foreign nationals, such as Japanese, Chinese, Filipino, Mexican

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[25] McDougal and Burke, THE PUBLIC ORDER OF THE OCEANS, at 340. See authorities on pages 34, 39-42 of this brief.

and Spanish. Requiring foreign nationals to purchase fishing licenses from Louisiana, and forcing foreign nationals to obey Louisiana fishing laws in East Bay, certainly interfered with their innocent passage in East Bay, the same as the arresting of Mexicans in East Bay 4.3 miles east of Southwest Pass in about 1946. Report, Finding of Fact No. 12, at 69. If Japanese, Chinese, Filipino, Mexican and Spanish had not obtained Louisiana licenses, they would have been prevented from fishing in East Bay or they would have been arrested if they fished without licenses as certain Mexican nationals were arrested. The fact that they purchased licenses and were checked by the Wild Life and Fisheries personnel showed their acquiescence in Louisiana's title to these inland waters. These acts of sovereignty inure to the benefit of the United States under the ruling of this Court in establishing Louisiana's inland waters.[26]

Claims to exclusive rights and exercise of sovereignty over bays in enforcing these rights have resulted in establishment of historic bays, particularly when these acts were prior to the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas of 1958. The granting of leases over the area to be used for fishing and the requiring of licenses to fish in the areas are assertions of jurisdiction. Gidel, 1 *Le driot international public de la mer*, 501 (1932); J.P.A. François, *Deuxieme rapport sur la haute mer*, Doc. A/CN. 4/42, (1951) 2 Y.B.I.

[26] This was long before the adoption of the Truman Proclamation in 1945.

L.C. 99; A. Papandreou, *La situation juridique des pecheries sedentaires en haute mer*, 72 (1958). (Also Queensland and Western Australia, *Papandreou* at 40-43 and 64-65; *François* at 96-98). McDougal and Burke, *The Public Order of the Oceans.*

To make an analogy to possession and prescription rules of the Civil Law, from which International Law on Historic Waters was derived, possession must be open and unequivocally as owner; that is, there must be acts suggestive of an intent to act as full owner. Navigational regulation *alone* under the circumstances described by the Court can well be understood as insufficient. However, exclusive acts have plainly evidenced a domestic imperium and dominium in East Bay: first, it is conceded that East Bay was a juridical bay until at least 1918, thereby removing any question that East Bay was inland waters of Louisiana until at least 1918. During the time East Bay was a juridical bay, Louisiana exercised acts of sovereignty over the bay which have continued to the present time, such as: asserting its title to East Bay by legislative acts open for inspection to the world; oyster leasing that started in 1903; mineral leasing which started in 1928; patrolling by armed vessels and armed personnel to enforce Louisiana laws since 1900, and arresting of foreigners in these waters for violating the Louisiana law. These acts and other acts found by the Special Master from the uncontradicted evidence introduced by Louisiana are so overwhelmingly exclusive that there should be no doubt as to their efficacy for historic bay purposes, especially in an

indentation which would give the plain geographic connotation of an inland bay claim.

The true impact of note 30 of the Court opinion, 394 U.S. 11, at 26, pertaining to the effect of the allowance of innocent passage, is that it is incumbent upon the party contesting the assertions of jurisdiction to show that innocent passage was normally or frequently allowed, that is, that the waters which are the subject of the historic claim were an international route for traffic between parts of the high seas. Not only did the United States fail to show such a thing, but the character of East Bay precludes such a showing. No vessel would go into East Bay for the purpose of getting to another part of the high seas but would only use it, navigationally, to enter or exit inland waters. East Bay is not useful for innocent passage to connect parts of the high seas. Shallowness or configuration makes international passage between parts of the high seas in the areas impossible. The real significance of the innocent passage quotation from the *Juridical Regime* document is this: jurisdictional acts which have been rejected as ineffective to prove an *inland* historic title were in the context of significant innocent passage, or the subject of an express limiting declaration. *United States v. California*, 381 U.S. 139, at 171-173, discussion of the fact that the Santa Barbara channel served as an important route of international passage which precluded it from being classed as inland water; discussion of Coast Guard Line in *United States v. Louisiana*, 394 U.S. 11, at 27; and U.S. Exh. 99, at 66.

The Special Master's finding that Louisiana's evidence has merely territorial significance is inconsistent with many authorities which, as we have demonstrated on the basis of lesser evidence than the undisputed evidence presented by Louisiana, have recognized bays to be historic inland bays.

Thus, the authorities recognize that there was no question that when Delaware Bay and Chesapeake Bay were adjudicated to be historic bays, their waters became inland waters of the United States. Op. A. G. 32 [1852]. *Stetson v. United States*, No. 3993 Class 1, (2d Court of Commissioners of Alabama Claims). This is likewise true of Long Island Sound. At first Long Island Sound was not recognized by the United States State Department as an historic bay, but this was corrected by Mr. Leonard C. Meeker, Legal Advisor for the State Department, in his letter to Mr. Erwin N. Griswold, Solicitor General, dated April 8, 1969.[27] When Long Island Sound was recognized as an historic bay, no question was raised about its waters being inland waters of the United States. See U. S. Exhibit 108.[28]

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[27] U. S. Exhibit 108.

[28] The finding by the Special Master that East Bay is an historic territorial bay means the Special Master determined (1) Louisiana had claimed title to and exercised sovereignty over the bay; (2) Louisiana had continued to exercise this sovereignty over East Bay, and (3) foreign states had acquiesced in these acts of sovereignty. Although there was no evidence of any foreign national using East Bay for navigation purposes, and Louisiana required foreigners to secure fishing

The United States does not now dispute authority of a state exercising sovereignty over bays to claim historic waters. *Juridical Regime*, 80. What kind of acts constitute "sovereignty" ? The United States contends that the requisite exercise of sovereignty must consist of acts directed against foreigners. The only evidence in the record on this subject is that introduced by Louisiana, which establishes that Louisiana's enforcement policies in East Bay were directed both against nationals and foreigners alike. The United States did not offer one scintilla of evidence to establish that foreigners used East Bay without complying with the laws, rules and regulations promulgated by Louisiana for fishing, hunting and exploring for minerals in these waters. Certainly if there was such evidence, the United States, with its vast resources, would have produced it.

Recognizing that sovereignty must be effectively exercised by deeds and not merely by proclamations,

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licenses before fishing in East Bay, the Special Master determined that the only element lacking was failing to interfere with the innocent passage of ships of foreigners in East Bay.

All historic bay closures claimed by Louisiana including those of East Bay and Caillou Bay, have a width in excess of 6 miles. Thus, claims that they enclosed territorial sea rather than inland waters, would be inconsistent with the repeatedly asserted United States position that it has never claimed a territorial sea in excess of three miles. Foreigners would have therefore understood exercises of jurisdiction as being clearly inland in character, for United States policy as to inland waters was not restricted by a three mile limit, certainly not as to historic bays.

the writers of the *Juridical Regime* stated:

> This does not, however, imply that the State necessarily must have undertaken concrete action to enforce its relevant laws and regulations within or with respect to the area claimed. It is not impossible that these laws and regulations were respected without the State having to resort to particular acts of enforcement. It is, however, essential that, to the extent that action on the part of the State and its organs was necessary to maintain authority over the area, such action was undertaken. *Juridical Regime* 99.

The absence of foreign vessels (except those who recognized Louisiana's sovereignty by the purchase of licenses from Louisiana) and Louisiana's policy of enforcing its laws and rules in the waters of East Bay against nationals and foreigners alike satisfy this pronouncement. In discussing the kind of authoritative acts the State must exercise, the author of the *Juridical Regime* document stated:

> Suppose. . . that the State has *continuously asserted that its citizens had the exclusive right to fish in the area*, and had, in accordance with this assertion, kept foreign fishermen away from the area or taken action against them. In that case the State in fact exercised sovereignty over the area, and its claim, on a historical basis, that it had the right to continue to do so would be a claim to the area as its "historic waters". The authority exercised by the State would be commensurate to the claim and would form a valid basis for the claim (without prejudice to the condition that the other requirements for the title must also

be fulfilled). *Juridical Regime* 86.[29] [Emphasis added].

The author went on to quote the opinions of prominent and internationally recognized writers on the subject. Gidel, in discussing the acts by which authority is exercised, stated:

> "It is hard to specify categorically what kind of acts of appropriation constitute sufficient evidence: *the exclusion from these areas of foreign vessels or their subjection to rules imposed by the coastal State which exceed the normal scope of regulations made in the interests of navigation would obviously be acts affording convincing evidence of the State's intent.* It would, however, be too strict to insist that only such acts constitute evidence. In the Grisbadarna dispute between Sweden and Norway, the judgment of 23 October, 1909 mentions that 'Sweden has performed various acts. . . owning to her conviction that these regions were Swedish, as, for instance, the placing of beacons, the measurement of the sea, and the installation of a light-boat, being acts which involved considerable expense and in doing which she not only thought that she was exercising her right but even more that she was performing her duty.' " *Juridical Regime* 89. [Emphasis added].

Bourquin, another writer, agreed and stated:

"What acts under municipal law can be cited

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[29] See Deposition of Captain Schouest on the armed patrols commencing in 1919, and how the Japanese and other foreigners honored them. Appendix I, at 158. See also depositions of other law enforcement officers. Appendix I, at 154-162.

> as expressing its desire to act as the sovereign? That is a matter very difficult, if not impossible, to determine *a priori*. There are some acts which are manifestly not open to any misunderstanding in this regard. The State which forbids foreign ships to penetrate the bay *or to fish therein indisputably demonstrates by such action its desire to act as the sovereign.*" *Juridical Regime* 90. [Emphasis added].

In the *Anglo-Norwegian Fisheries Case, United Kingdom v. Norway*, [1951] I.C.J. 116, Norway stated in its Counter-Memorial:

> "It cannot seriously be questioned that, in the application of the theory of historic waters, acts under minicipal [sic] law on the part of the coastal State are of the essence. Such acts are implicit in an historic title. It is the exercise of sovereignty that lies at the basis of the title. It is the peaceful and continuous exercise thereof over a prolonged period that assumes an international significance and becomes one of the elements of the international juridical order." *Juridical Regime* 93.

Clearly Louisiana's evidence meets the test set forth in the above-quoted portions of the *Juridical Regime*, an authority admitted by the United States to be controlling in this case. This Court has already decided that state acts may be considered in establishing sovereignty over inland waters.

The Court having recognized that the definition of historic inland waters is imprecise, Louisiana followed the teachings of this Court, as suggested in its

opinion, to determine if its historic inland waters would meet the international test. Louisiana called as a witness, Dr. Leo Bouchez, Associate Professor, Institute of Public International Law of the University of Utrecht, the Netherlands, who was recognized by this Court as an authority on the law of the sea, to testify what an international tribunal with appropriate jurisdiction would hold the customary international law to be in establishing inland waters.[30]

After Louisiana had introduced its evidence as to acts of sovereignty and jurisdiction exercised by Louisiana and United States over East Bay (summarized by the Special Master in his findings as Appendix B [Report, at 67-69]), Dr. Bouchez was then called as a witness. Dr. Bouchez was asked a hypothetical question, assuming facts established respecting East Bay substantially as the Master has found them to be. What would an international tribunal determine to be the legal rights of the adjacent state in the water and the subsoil of the area involved in the assumed facts?

Dr. Bouchez' opinion, expressed at page 992 of the transcript, was that such a hypothetical indentation would come under the regime of internal waters as fitting the historic bay doctrine.

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[30] Dr. Bouchez was recognized by the Court as an authority on historic inland waters. See United States v. Louisiana, 394 U.S. 11, at 22 n. 23, 23 n. 27, 27 n. 31, 76 n. 103. See La. Exh. 60 for an extensive history of Dr. Bouchez' expert qualifications in the field of international maritime boundary law.

This testimony is the opinion of a recognized expert in the field of the law of the sea, which field this Court has determined is imprecise. We respectfully urge that his expert opinion is entitled to great weight in this proceeding.

Louisiana Need Not Show Actual Formal Acquiescence by a Foreign Government in Order to Establish its Historic Bay Claims

In a further effort to defeat Louisiana's claim, the United States argued that Louisiana must show actual acquiescence by foreign governments to establish an historic bay claim even though no foreign government has ever protested the acts of sovereignty exercised over East Bay by Louisiana and the United States. While some proponents of the theory of acquiescence require proof of express consent of other States, it is generally agreed that "inaction" of those States in favor of a line of conduct of a coastal State would be sufficient. Thus, Sir Gerald Fitzmaurice admits that the argument of the United Kingdom in the *Fisheries Case* was really limited to the contention that:

> the true role of the theory [of historic rights] is to compensate for the lack of any evidence of express or active consent by States, by creating a presumption of acquiescence arising from the facts of the case and from the inaction and toleration of States. But of course it is still this presumed acquiescence, not the usage *per se*, which creates the right. Moreover, the historic element only creates a *presumption* of acquiescence. It

> remains open to any State against which the claim is invoked to rebut this presumption if it can, and to show that in all the circumstances it cannot be held to have consented. [Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54; General Principles and Sources of Law," 30 British Year Book of International Law (1953), p. 1, at 29-30. See also McGibbon, "The Scope of Acquiescence in International Law," 31 *idem* (1954), p. 143.]

As Bourquin puts it, what matters is whether the reactions of other States "interfere with the peaceful and continuous exercise of sovereignty" by a coastal State to the point of divesting it of its chance to establish an historical title. "Obviously only acts of opposition can have that effect. So long as the behavior of the riparian State causes no protest abroad, the exercise of sovereignty continues unimpeded." Acquiescence is not necessary; the "absence of any reaction by foreign States is sufficient." Bourquin, "Les baies historiques," *Melanges Georges Sauser-Hall* (1952), p. 37, at 46.

Consequently, the United Nations study suggests the abandonment of the term "acquiescence" and the use instead of the term "toleration" (used also by the International Court of Justice in the *Fisheries Case*, [1951] I.C.J. 116, 138-39). *Juridical Regime* 111. Such toleration ceases, if other States actually lodge an effective protest against the claim asserted by the coastal State. To stop acquisition of a title, the opposition must be sufficiently strong, both in the effectiveness of the protest and the number of States opposing the

claim. What is an effective protest depends on the circumstances of the case, but an isolated protest by one State only is certainly not sufficient. While the coastal State has to prove the basis of its claim, a State opposing such a claim would have to prove that there has been sufficient opposition to nullify the claim. It cannot be said that the whole burden of proof is on the coastal State. There is no basis for the argument of the United States that only actual expressed acquiescence by a foreign nation must be established before an historic bay claim can ripen.

The principle previously discussed that water bodies once inland remain inland, accords with the Supreme Court opinion, for it is derived from historical geographical reasoning. Nor does the principle conflict with the ambulatory commentary of the Supreme Court, if mechanistic literalism is avoided and context considered. That ruling was *not* in the context of Mr. Miller's point that water bodies, whether straits, sounds or bays, remain subject to the jurisdiction of a State once they fall under the jurisdiction of a State. Surely the Supreme Court has recognized that no amount of geographic change of the shoreline in an historic bay will change its legal status, since *continued* legal status is not *dependent* on *precise* present geography.

> ... [O]ther areas of water closely connected to the shore, although they do not meet any precise geographical test, may have achieved the status of inland waters by the manner in which they have been treated... 394 U.S. 11, at 23.

A fortiori, if waters *had* formerly met precise geographical tests and had *also* been treated as a bay, failure to *continue* to meet precise geographic tests would be immaterial. Thus, the doctrine is traceable to this Court's language. Mr. Miller at the Hague was not speaking of mere changes of shoreline and related three-mile projections from the shoreline; Mr. Miller was speaking of geographic entities *not* changing status.

The Holding that the United States had Effectively Disclaimed Louisiana's Historic Bays so that Louisiana Would Have to Prove Its Historic Claim "Clear Beyond Doubt" was in Error

The question after 1948, when the United States made its oil claims for East Bay as against Louisiana, is not whether thereafter *the federal government* continued to recognize the bay, for this Court said:

> It would be [impermissible] to allow the United States to prevent recognition of a historic title which may have already ripened because of *past* events but which is called into question for the first time in a domestic lawsuit. The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in *United States v. California. United States v. Louisiana*, 394 U.S. 11, at 77 n. 104.

The Special Master relied on evidence after Louisiana's title had already vested by past events to establish the United States disclaimed East Bay as an historical bay. The acts of disclaimer were urged by the United States to require proof by Louisiana beyond

reasonable doubt. Other than the filing of this litigation in 1949, the remaining acts of disclaimer asserted by the United States took place, commencing in 1969, long after this litigation was under way and consisted only in letters from a federal official to another covering this litigation. This is evident by the Special Master's findings to this effect:

> The United States has disclaimed any intention on its part of seeking to establish any inland waters along the coast of the State of Louisiana on historic principles. In fact, the very filing of the present suit and its vigorous prosecution itself constitutes such a disclaimer. In a letter dated April 8, 1969 from Leonard C. Meeker, Legal Advisor, Department of State to Erwin N. Griswold, Solicitor General, Department of Justice (U.S. Exhibit 108) it is stated:
>
> "We are not aware of any foreign waters which have been recognized as historic by the United States."
>
> In a later letter dated April 4, 1970 from John N. Mitchell, Attorney General of the United States, to William P. Rogers, Secretary of State of the United States (U.S. Exhibit 114) it is further stated:
>
> "[T]he Department is unaware of any evidence regarding a claim by the United States Government of historic bays in any other area which would not now qualify as a legal bay under Article 7, paragraphs 1-5, of the Convention on the Territorial Sea and the Contiguous Zone."

> In April 1971, the United States published a set of 155 maps delimiting the three mile territorial sea, the nine mile contiguous zone and certain internal waters of the United States, including the boundaries for the entire coast of Louisiana (U.S. Exhibit 416D). These maps are available for sale to the general public and have been distributed to foreign governments in response to requests to the United States Department of State for documents delimiting the boundaries of the United States. As shown thereon, those boundaries are entirely consistent with the position taken by the United States in this litigation, and do not include any historic bays along the coast of Louisiana which would not otherwise qualify as juridical bays. Report, at 16-17

The United States is urging this disclaimer of inland waters along Louisiana's coast, including East Bay, so as to advance its unsound argument that Louisiana's claim of historic bays must be proved by evidence "clear beyond doubt." In the first place, there was no disclaimer by the United States before this litigation in 1949. In addition, the acts relied on by the Special Master are not clear disclaimers of historic waters.

In the letter from Leonard C. Meeker, Legal Adviser, Department of State, to Erwin N. Griswold, Solicitor General, dated April 8, 1969, Files, Department of State (U. S. Exhibit 108), Mr. Meeker suggested that the United States respond to Interrogatory #10 of Alaska as follows:

> "The United States does not recognize as

> historic any bays with closure lines exceeding 24 miles. Prior recognition of historic water such as Delaware Bay, Chesapeake Bay, and perhaps Long Island Sound are now irrelevant since all these bodies of water would now be inland under the 24-mile closure rule. We are not aware of any foreign waters which have been recognized as historic by the United States."

Note that none of the historic closures claimed by Louisiana exceed 24 miles. He continued his letter:

> It has now come to my attention that on December 8, 1879, commissioners of New York and Connecticut executed an agreement drawing a common boundary between those two States through Long Island Sound, which was ratified by the legislatures of both States and was approved by Congress. Act of February 26, 1881, 21 Stat. 351. This Congressional action supplies the element of formal governmental assertion that I previously supposed to be dubious, *and leaves unquestionable the status of Long Island Sound as historic inland waters. The status of the Sound as "historic" has never been disputed.* Cf. Jessup, The Law of Territorial Waters and Maritime Jurisdiction (1927) 224-227; 4 Whiteman, Digest of International Law (1965) 237, 241-242. This makes it unnecessary to consider the applicability of a 24-mile closing line under Article 7 of the Convention on the Territorial Sea and the Contiguous Zone. [Emphasis added].

Then, at the end of the letter, he stated:

> I suggest that the United States' responses

> to Alaska's interrogatories should be amended to reflect the foregoing.

This letter does not purport to disclaim any historical inland waters along the coast of Louisiana. It states that the United States does not recognize as historic any bays or closing lines exceeding 24 miles and that the writer is not aware of any foreign waters which have been recognized as historic by the United States. Mr. Meeker then went on to recognize that although he initially stated that Long Island Sound was not historic waters, he has now determined that it is historic waters and that the status of Long Island Sound as historic inland waters *has never been disputed.*[31]

The next document cited is a letter from Leonard C. Meeker, Legal Adviser, Department of State, to Shiro Kashiwa, Assistant Attorney General, dated July 3, 1969, Files, Department of Justice (U.S. Exhibit 109). This letter merely related to Cook Inlet. In this connection Mr. Meeker said:

> In its conduct of United States foreign relations the Department of State does not consider that Cook Inlet is a historic bay. On the basis of the foregoing, it is my opinion that Cook Inlet should not be considered a historic bay.

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[31] In spite of this statement by Mr. Meeker, the United States is now urging "Louisiana must prove that foreign nations have acquiesced in the alleged claim." Post-trial Brief for the United States before the Special Master, United States v. Louisiana, No. 9, Original, 1971, at 78. No such proof is required, as admitted by Mr. Meeker in his letter of April 8, 1969.

Since this purported disclaimer only related to Cook Inlet, it was not a disclaimer of historic inland waters off the coast of Louisiana.

In his memorandum and order in *United States v. Alaska*, U. S. District Judge von der Heydt,[32] in commenting on this disclaimer by Mr. Meeker of the State Department, had this to say:

> The disclaimers in the instant case approach the impermissible contraction of authority cautioned against by the Supreme Court, especially in view of the clear evidence of continuous assertions of sovereignty over lower Cook Inlet. Considering the circumstances under which they were prepared, the Court assigns a low reliability factor to the disclaimers. The first disclaimer was a letter from the Legal Advisor to the Secretary of State. The Court finds the evidence to show the disclaimer to have been hastily prepared and based on questionable research. The second disclaimer was also a letter from the State Department. That disclaimer was prepared two years after the commencement of this action, and was vulnerable to self-serving interests. *United States v. Alaska*, 352 F. Supp. 815 (1972), at 818-819.

The next document referred to is a letter from John N. Mitchell, Attorney General, to William P. Rogers, Secretary of State, dated January 30, 1970, Files, Department of State (U.S. Exhibit 110), in which it is stated:

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[32] Judge von der Heydt found Cook Inlet an historic bay. His opinion has been affirmed by the 9th Circuit Court of Appeals and writs of certiorari have been applied for by the United States to this Court. United States v. Alaska, 497 F.2d 1155 (1974).

> In formulating our positions on these matters we have been in close contact with the office of the Legal Adviser. As a result, we have taken the position that neither East Bay, nor Isle au Breton Bay, nor Caillou Bay is historic inland waters of the United States and that the United States has not drawn straight baselines on the Mississippi River Delta or at Caillou Bay.

In his reply to that letter, William P. Rogers, Secretary of State, wrote to John N. Mitchell, Attorney General, on April 14, 1970, Files, Department of State (U.S. Exhibit 114):

> With respect to the questions raised in your January 30 letter, the territorial sea of the United States is measured in strict conformity with the provisions of the Convention on the Territorial Sea and the Contiguous Zone. The United States Government has taken no action to establish a system of straight baselines pursuant to Article 4 of that Convention or customary international law with respect to any area along its coast. Regarding historic bays, the Legal Adviser, by letter dated February 20, 1969, to the Solicitor General, has already expressed his opinion on the status of Long Island Sound. The Department is *unaware* of any evidence regarding a claim by the United States Government of historic bays in any other area which would not now qualify as a legal bay under Article 7, paragraphs 1-5, of the Convention on the Territorial Sea and the Contiguous Zone. It has, for example, found no such evidence with respect to the area mentioned in your letter. [Emphasis added].

This statement by the Secretary of State cannot be treated as a disclaimer of any historic inland waters along the Louisiana coast. The only thing the Secretary of State is saying is that the United States has not established a system of straight baselines along the coast of Louisiana under Article 4 of the Convention which was adopted in 1961, and he is unaware of any evidence regarding claims *by the United States* of historic bays in any other area which would not qualify as a legal bay under Article 7. The Secretary of State then referred to the original letter from the Legal Adviser of the State Department to the Solicitor General, dated February 20, 1969, in which, at that time, the Legal Adviser had stated that Long Island Sound was not historic inland waters. This was later corrected by the letter of April 8, 1969 (U.S. Exhibit 108), which we have already quoted. There the Legal Adviser stated that from additional research, he had determined that Long Island Sound was unquestionably historic waters. The letter was couched in terms so as not to act as a disclaimer in the event the evidence justified such historical inland waters.

The Master then refers to a set of 155 maps delineating the three-mile territorial sea, dated in April, 1971, and introduced over the objection of Louisiana as U. S. Exhibit 416D. These maps were prepared by the United States during the trial of this case and after Louisiana had put on the majority of its evidence.

These maps carried the following legend:

CAUTION
THIS DOCUMENT IS NOT FOR USE IN NAVIGATION

The lines drawn on this document delimit provisionally the territorial sea, contiguous zone, and certain internal waters of the United States. They have been prepared by an interdepartmental committee and represent its interpretation of relevant legal principles as applied to the geographical information shown on a Coast and Geodetic Survey nautical chart which has been used as a base. These lines are subject to revision whenever it is required by amplification or correction of the information shown on the chart or by reinterpretation of the legal principles involved. This document does not attempt to delineate international boundaries and is not to be understood as asserting or implying where they are located.

Judge von der Heydt, in the *Alaskan* case, in his findings of fact and conclusions of law, dated the 29th day of January, 1973, found the disclaimers advanced by the United States in that case ineffective, for he stated:

> 103. The so-called disclaimers relied upon by the United States government are ineffectual because (a) they are refuted by historic evidence, referred to above, which is clear beyond doubt; (b) they were hastily prepared, based on questionable research, and offered in a self-serving effort by the federal government to have the Court disregard historic facts; and (c) came at a time when historic title had already ripened into ownership of the disputed area of Cook Inlet.

104. The background investigation pertaining to the letter from Abram Chayes to Frank J. Barry dated May 3, 1962 was done by a staff assistant in the Office of the Secretary of State's Legal Advisor. The investigation was limited to records of the State Department. (Exhibit 58; Chayes' depos. pp. 5-12; Yingling's depos. pp. 5-12; 15-16; 18-21)

105. The background investigation pertaining to said letter was inadequate in that: (a) not all of the records of the State Department or other departments necessary to form an adequate basis for the conclusions contained in said letter were searched; (b) an adequate investigation would have required research by one person of at least three months, whereas in fact, the one person assigned to the project took only six days. (Simon's depos., pp. 54-55; Exhibits HT; HT-1; Alaska's 11th Set of Interrogatories No. 4)

106. The conclusions contained in the letter from Leonard Meeker to Shiro Kashiwa, dated July 3, 1969, were based on no research other than that referred to above, plus an insignificant amount of additional research. (Carter's depos., pp. 6-11)

107. The charts depicted by Exhibit 73 were drafted by the Law of the Sea Baseline Committee at a time when this case was pending in this court. Among the members of that committee at the time was the principal attorney for the United States in this litigation. Said exhibit cannot be said to be an unbiased product. (Hodgson's depos., pp. 10-15; Exhbits HY, HX, IB, IC, IC-1)

108. The background factual research per-

taining to Exhibit 73 was based upon no information other than that referred to in Findings 104-106. (Hodgson's depos., pp. 6-7; 44-45; 48-49)

109. Contrary to the position now advanced by the United States in lower Cook Inlet, the Baseline Committee determined Long Island Sound to be historic waters of the United States in the absence of a declaration by the Executive Branch to that effect. The Baseline Committee failed to discuss, in its deliberations, the possible historic status of Cook Inlet and it is clear such committee did not have before it the evidence which has been presented to this Court (Hodgson's depos., pp. 49, 151-153; 157-159; Exhibit HX).[33]

Even if the Court considers the documents as disclaimers, such disclaimers, under this Court's holding, cannot now divest Louisiana of title to inland waters already vested in 1948.

This Court said:

> The only fair way to apply the Convention's recognition of historic bays to this case, then, is to treat the claim of historic waters as if it were being made by the national sovereign and opposed by another nation. 394 U.S. 11, at 77.

The government attempted to nullify this language by the argument that historic waters are based upon sovereignty; that only the United States Government has sovereignty; and so it is impossible for a State

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[33] Finding of Facts and Conclusions of Law by Judge von der Heydt. Appendix "C" to petition for writ of certiorari to the United States District Court of Appeal for the Ninth Circuit No. 73-1888, p. 46(a).

to have historic waters not claimed to be such by the United States.[34] We consider the argument quite unreasonable, especially in the light of the statement by the Court. Clearly, the matter of national sovereignty based on State action may not be disputed by the United States to defeat the historic claims already vested in Louisiana. Nor is the assertion of the United States that the claims must be proved "*clear beyond doubt*" valid. The italicized words are lifted out of context and are *clearly not within the concept of the reference by the Supreme Court to the Special Master.* The Court said that in the *California* case it had noted at page 175:

> . . . we were "reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt." 394 U.S. 11, at 77.

But the Court certainly did not make the test one of "clear beyond doubt," nor did it leave the matter to the wish of the executive department of the government, for the Court said:

> Thus, the Court indicated its unwillingness to give the United States the same complete discretion to block a claim of historic inland waters as it possesses to decline to draw straight baselines.

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[34] To sustain this statement, the United States cites the cases of Jones v. United States, 137 U.S. 202, at 221; Pearcy v. Stranahan, 205 U.S. 257, at 265; and Vermilva-Brown Co. v. Connell, 335 U.S. 377, at 380. We do not disagree with the holding in these cases, but they are not applicable here, for the Court, in its opinion, has interpreted the provisions of the Convention and has determined the criteria on which the Speical Master is to consider this case.

> While we do not now decide that Louisiana's evidence of historic waters is "clear beyond doubt," neither are we in a position to say that it is so "questionable" that the United States' disclaimer is conclusive. *Ibid.*

In commenting on the burden of proof in the *Alaska* case, Judge James A. von der Heydt said:

> The final qualification concerns the quantum of proof required for a showing of historic title. The expression "clear beyond doubt", as it first appeared in United States v. California, 381 U.S., at 175, 85 S.Ct. 1401, could very well not have been intended by the Supreme Court to establish such a high standard of proof in all cases. The context in which that phrase appeared pertained to the legal effect of a disclaimer by the United States in the face of questionable evidence of historic title. The context of this case is clearly distinguishable. Further, there is other language in that case which implies that no rigorous standard of proof is required to prove historic title. 381 U.S., at 174, 85 S.Ct. 1401. Nor do the long respected commentators of international law appear to require a rigorous standard of proof. Juridical Regime 1581. Despite this uncertainty over the burden of proof, this Court will adhere to the higher standard of proof, for the reason the Court finds the State of Alaska has satisfied the requirements for establishment of historic title even under the more rigorous standard.[35]

Louisiana agrees with Judge James A. von der Heydt, in the *Alaskan* case, that the Court did not in-

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[35] United States v. Alaska, 352 F. Supp. 815, at 819.

tend to establish such a high standard of proof that would meet the test "clear beyond doubt." Even if it were the intent of the Court to establish such a rigorous standard, Louisiana's evidence meets such a standard and we urge that the Court find that East Bay is an historic bay containing inland waters landward of a closing line from X=2,697,850, Y=117,200 to X= 2,609,180, Y=91,445.

SECOND EXCEPTION

OTHER HISTORIC BAYS

The State of Louisiana further excepts to the Special Master's conclusions that the waters treated by Louisiana as inland historic waters in the remaining Mississippi River Delta and Caillou Bay are not now historic inland waters, but are part of the territorial sea or high seas, notwithstanding his finding that the facts presented by Louisiana are undisputed and must be taken as true.

MISSISSIPPI DELTA BAYS

It is conceded the other bays in the Mississippi Delta are juridical bays, the only dispute being the proper headlands from which to draw the closing lines. It is Louisiana's position that these bays are historic bays to their outermost headlands. We must remember, Louisiana's title to these bays from "an imaginary line joining outermost mudlumps and other features marking the seaward terminus of the bays" [36] was not disputed by the United States until 1948.[37]

Our argument in this brief demonstrating that East Bay is an historic bay applies in large measure to these other Mississippi Delta bays. We will not repeat such argument in this section of the brief.

What areas would the United States and Louisiana have a greater interest in maintaining as part of the inland waters of the United States than the bays

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[36] Report, Finding of Fact No. 6, at 68.

[37] Report, Finding of Fact No. 16, at 69.

formed by the delta of the great Mississippi River?

There was no question about the inland character of these waters before 1948. This was only three years after the Truman Proclamation of 1945 in which the United States asserted ownership to the minerals in the Continental Shelf. Even though the United States would gain title to minerals by restricting the inland waters in the Mississippi Delta, it is of even greater importance to maintain the inland waters claimed by Louisiana prior to 1948 in the delta for it is from the gulfward limits of the inland waters that the territorial sea and fishing zones are measured. The protection of the delta from foreign nationals is of prime importance and should override any attempt by the United States to weaken the protection of this area by now trying to disclaim inland waters, title to which vested in Louisiana prior to 1948. Louisiana's title was asserted long before oil was discovered.

The findings of fact by the Special Master (Report, at 67-69) relate in most part to the total Mississippi Delta area.[38] This is also true of the Tern Islands Reservation, Inland Water Lines, charts of this Court in the Mississippi-Louisiana case, and Proudfoot, *Measurement of Geographic Area.* These acts of sovereignty in the delta area are discussed in detail at pages 178, 182-184 of Appendix I. As to the remaining bays of the delta, we respectfully urge that the Court should

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[38] See Appendix I, at 172-184 for a detailed discussion of and transcript references to the evidence sustaining Louisiana's position.

adopt closing lines enclosing the historic waters of the bays as follows:

(1) Isle au Breton Bay—The closing line for the historic waters of Isle au Breton Bay is a line from X=2,737,288, Y=345,654 to X=2,755,325, Y=204,680.

(2) Blind Bay—The closing line for the historic waters of Blind Bay is a line from X=2,751,045, Y=181,305 to X=2,726,105, Y=148,530.

(3) Garden Island Bay—The closing line for the historic waters of Garden Island Bay is a line from X=2,724,850, Y=148,150 to X=2,702,461, Y=124,148.

(4) West Bay—The closing line for the historic waters of West Bay is a line from X=2,607,290, Y=93,040 to X=2,590,100, Y=203,860.

Additionally, as treated in the discussion of *The "Anna" infra*, p. 117-18, the mudlump island groupings enclose historic inland waters, which form part of the mainland, both juridically and geographically.

CAILLOU BAY

Caillou Bay has been treated as a juridical and historic bay by Louisiana from its admission into the Union in 1812 to the present date. Caillou Bay has been designated as a bay on maps since that date. When Act 52 of 1904 and similar prior and subsequent acts were passed by the Louisiana Legislature whereby Louisiana claimed title to the beds and bottoms of all bays on the Gulf, Caillou Bay was such a bay and title was there again reaffirmed in the State of Louisiana. Louisiana's title to Caillou Bay was not called into

question in this domestic litigation until 1968[39] when the United States, in the Proposed Supplemental Decree No. 2 and its Memorandum in Support Thereof, urged that Caillou Bay was not a juridical or historic bay and that part of the waters of Caillou Bay, formerly recognized by the United States as being the inland waters of Louisiana, was part of the open sea. 394 U.S. 11, at 73 n. 97.

Louisiana's title to Caillou Bay as inland water, both as a juridical bay and an historic bay, was vested long prior to being called into question in this litigation in 1968, long after Louisiana's title to East Bay was called into question in 1948.

The Special Master, after hearing all of the evidence in this case, stated:

> In the absence of such a holding[40] the Special Master would upon the evidence presented before him

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[39] The United States recognized Caillou Bay as inland waters and Louisiana continued to lease Caillou Bay for oil, gas and mineral purposes. The moneys received from these oil operations were excluded from the 1956 Interim Agreement between the United States and Louisiana since it was recognized that the waters of Caillou Bay belonged to the State of Louisiana. It is only in 1968, when the United States changed its position, that it is now claiming a portion of Caillou Bay is the open sea and that some of the moneys received by Louisiana should be paid to the United States under the Outer Continental Shelf Lands Act. This change in position will prejudice Louisiana since it will have to account for funds long recognized by the United States as belonging to Louisiana, and should create an estoppel against the United States. This late change in position has prejudiced Louisiana. See discussion of the surveying prejudice, *infra* at 148-150.

[40] United States v. Louisiana, 394 U.S. 11, at 67 n. 88.

> be inclined to hold that based upon their size, proximity, configuration, orientation and nature these islands would constitute an extension of the mainland and would therefore hold that Caillou Bay is a juridical bay with a closing line between points at coordinates X=2,117,317, Y=143,491 and X=2,076,201, Y=189,799. This would appear to be in accord with the view of the Special Master in the case of *United States v. Florida*, No. 52 original, in regard to certain of the Florida keys. Report, at 50-51.

This holding of the Master was based on the statement of the Court

> Louisiana does not contend that any of the islands in question is so closely aligned with the mainland as to be deemed a part of it, and we agree that none of the islands would fit that description. 394 U.S. 11, at 67 n. 88.

Louisiana respectfully states that the positions attributed to it in the above note were based on incomplete evidence and before evidence was introduced in the trial before the Special Master. Substantial evidence was introduced by both Louisiana and the United States, which formed the basis of the conclusion reached by the Special Master. Caillou Bay is an historic bay as well as a juridical bay.

Many of the acts found by the Special Master as acts of sovereignty exercised by Louisiana (see Report, Findings of Fact, at 67-69) apply to Caillou Bay.

We refer the Court to pages 184 to 210 of Louisiana's Appendix I to this brief for a more detailed discussion of Louisiana's historic claim to Caillou Bay.

For the past twenty-eight years (1940 to 1968), the water body known as Caillou Bay was explicitly recognized by the United States as inland waters. This was prior to the inception of and during the bulk of the submerged lands litigation. Caillou Bay was treated as inland waters by the Department of Commerce in 1940 for the purpose of taking the census of the United States (Appendix I, at 192). This was likewise true of the map prepared by the United States on August 26, 1950, after the inception of this lawsuit in 1948 showing "the most landward line that the Government would claim for the Federal-State boundary" (Appendix I, at 191 and 192). The evidence establishes that Caillou Bay has exhibited a configuration and characteristics sufficiently bay-like to have been considered a bay on maps and charts for over 130 years, and that the waters of Caillou Bay are completely surrounded by the lands and waters of Louisiana, except for the opening facing on the Gulf of Mexico and that various bayous and other tributaries entering Caillou Bay are entirely situated within the lands of Louisiana. Caillou Bay is well marked by headlands inside of which the mariner instinctively feels himself within the jurisdiction and dominion of Louisiana.

All of Caillou Bay's waters are such that they can easily be patrolled and protected by the government entity that has control of its shores, which in this case is Louisiana. The waters of Caillou Bay have been sufficiently enclosed to provide shelter for coastal craft and Caillou Bay has never been a waterway for intercourse

between nations. (Appendix I, at 203, 204) Louisiana has claimed title and sovereignty over Caillou Bay by various acts of the Louisiana Legislature as found by the Special Master (Report, Finding of Fact No. 13, at 69). Louisiana has enforced its fishing and hunting regulations over Caillou Bay from the early 1900's as found by the Special Master (Report, Findings of Fact, at 68 and 69). Louisiana has leased for oil and gas purposes the waters and water bottoms of Caillou Bay since 1928 and subsequent to the Truman Proclamation of 1945.[41]

Louisiana respectfully urges that the Court find Caillou Bay an historic bay with a closing line from X=2,117,317, Y=143,491 to X=2,076,201, Y=189,799, being the same closing line the Special Master recommends as a closing line for Caillou Bay as a juridical bay.

[41] See Appendix I from pages 184-210.

THIRD EXCEPTION

JURIDICAL EAST BAY

The State of Louisiana further excepts to the Special Master's failure to find that the portions of East Bay seaward of Closing Lines C and D satisfy the semicircle test: alternatively, the Report did not reflect dates when closing lines seaward of Lines C and D ceased to satisfy the test after 1918.

EAST BAY BEHIND LINE A HAS ALWAYS QUALIFIED AS A BAY

This argument is the first of several on exceptions which treat juridical bay questions. It pertains to East Bay, between Southwest Pass and South Pass of the Mississippi. Louisiana's primary juridical position is that a line (Line A)[42] using the outer natural[43] entrance points of the indentation both formerly and presently qualifies as a bay closing line. It has always so qualified, even more clearly in the past.

The Master noted that "it appears to be conceded that prior to 1918 it did so qualify." Report, at 27. See evidence summarized in Appendix I, at 129-132.[44]

[42] From X = 2,697,850, Y = 117,200 at South Pass to X = 2,624,995, Y = 108,700 at Southwest Pass as shown on La. Exh. 197.

[43] Article 7 requires use of natural entrance points. This Court's prior rejection of a closing line at East Bay involved use of a jetty as a headland for a line that failed to pass the semicircle test, due to the artificially widened mouth formed by a four-mile jetty. 394 U.S. 11, at 53.

[44] Appendix I is a document heretofore filed with the Master as explained *supra* in n. 10, which sought reconsideration of his draft Report, but which was rejected in globo without a point by point consideration of the largely uncontested

Evidence summarized, Appendix I, at 132-134, showed East Bay was a bay and fully treated as a bay between 1918 and the filing of this suit. La. Exh. 23 and 23A explained in the testimony of Dr. Morgan, tr. 388 *et seq.*, showed that the charts which existed at the time of and prior to the filing of this suit demonstrated that East Bay satisfied all bay tests, even the semicircle test using the extremely conservative method approved by the Master (Method 1). Appendix I, at 220-224, treating data on the configuration of East Bay on official large-scale charts of the United States during the period 1944 to 1956. The Convention requires use of such charts, Article 3.

Before discussing each closing line alternative claimed by Louisiana, it is well to note that this discussion, although intended for the juridical aspects of the case, reinforces Louisiana's historic claims.

This Court's careful choice of language in recognizing that historic bays *need not* conform to normal geographic tests was not a finding that they *must not* conform to normal geographic bay tests. Certainly, Delaware Bay and Chesapeake Bay are no less historic bays merely because they satisfy juridical or normal geographic standards. Rather, the language of the Court quoted *supra*, at 30-31, indicates historic bays must possess a geographic bay-like configuration, al-

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points made therein. Considered point by point, it required reversal of most of the rulings of the Report which rejected Louisiana's claims. We shall hereafter refer to it frequently, adopting material therein by reference, in the interest of brevity.

though they may have less than normal geographic bay characteristics. *A fortiori*, satisfaction of normal geographic bay standards for much of an indentation, even at present, is obviously a positive factor in favor of an historic bay finding. Also, satisfaction of the more stringent normal geographic standards in the past over an extensive time period quite obviously fortifies an historic bay claim. This is specially so when it is considered that the international community would have comprehended, even absent particular corporeal acts, that a coastal state continuously claimed inland authority as to a normal geographic bay. See discussion and authorities quoted at 30-36, 43-46 *supra* on historic bay requirements.

Line A and All Other Alternative Lines Satisfy the Semicircle Test by Use of the Article 7 Method of Including Islands and Waters Outside of the Low-Water Mark in the Area Measured

Louisiana's position that even after 1956, Line A qualifies to the present is predicated upon use of a semicircle test area measurement method which followed the direction of Article 7 of the Convention to use islands and follow the low-water line, thus using tributary waters. This Article states:

> 2. . . . An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semicircle whose diameter is a line drawn across the mouth of that indentation.
>
> 3. For the purpose of measurement, the area of an indentation is that lying between the low-

> water mark around the shore of the indentation . . . . Islands within an indentation shall be included as if they were part of the water area of the indentation.

The principle of this Article is reflected in Figure 1.

Line A meets the objective semicircle test if the method of measurement prescribed by Article 7 (described as Method 3 in the proceedings before the Special Master) is followed. If the method provided in Article 7 is rejected in favor of more restrictive methods, Line A would not qualify but other lines between identifiable headlands would qualify. These lines were identified as Lines B, C, and D in the trial before the Master. The coordinate descriptions for these lines are reflected in La. Exh. 197. Further alternatives sub-

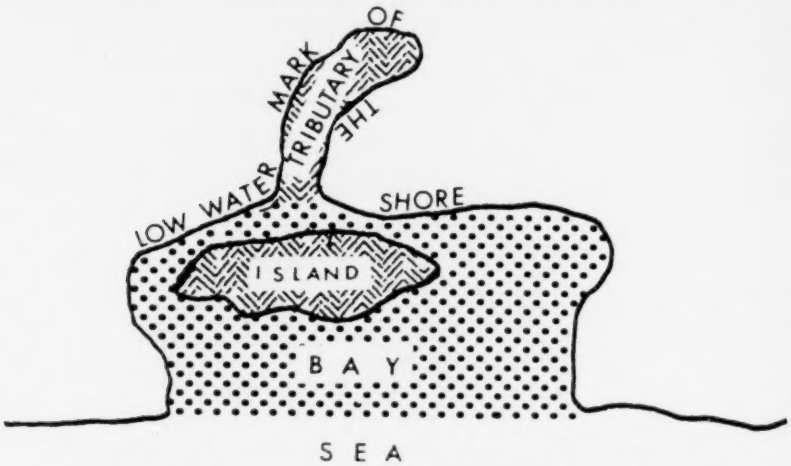


Figure 1. Illustration of Article 7 rule requiring use of tributary area outside of low-water mark of the shore, and use of island area for measuring area of the bay. Tributary and island areas would be added to water area of the bay for measuring bay area under the semicircle test.

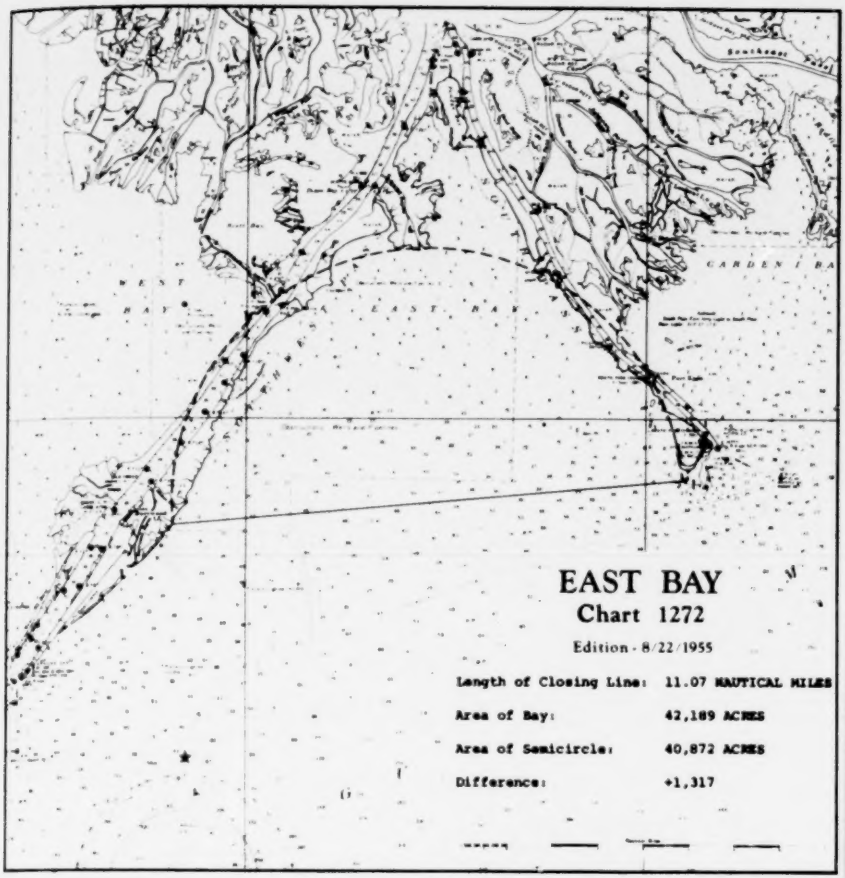


Figure 2. Portion of La. Exh. 23A showing semicircle test data for a juridical bay closure (approximating Closing Line A on La. Exh. 197) on the 9/22/55 edition of Chart 1272. Note that the method of planimetry reflected on the overlay for this chart in La. Exh. 23A is equivalent to Method 1, the system of excluding tributary waters and until this chart was changed in 1956, the bay qualified. (Details of the low-water line in the vicinity of Cowhorn Island did not reproduce. See original exhibit for full-size detail.)

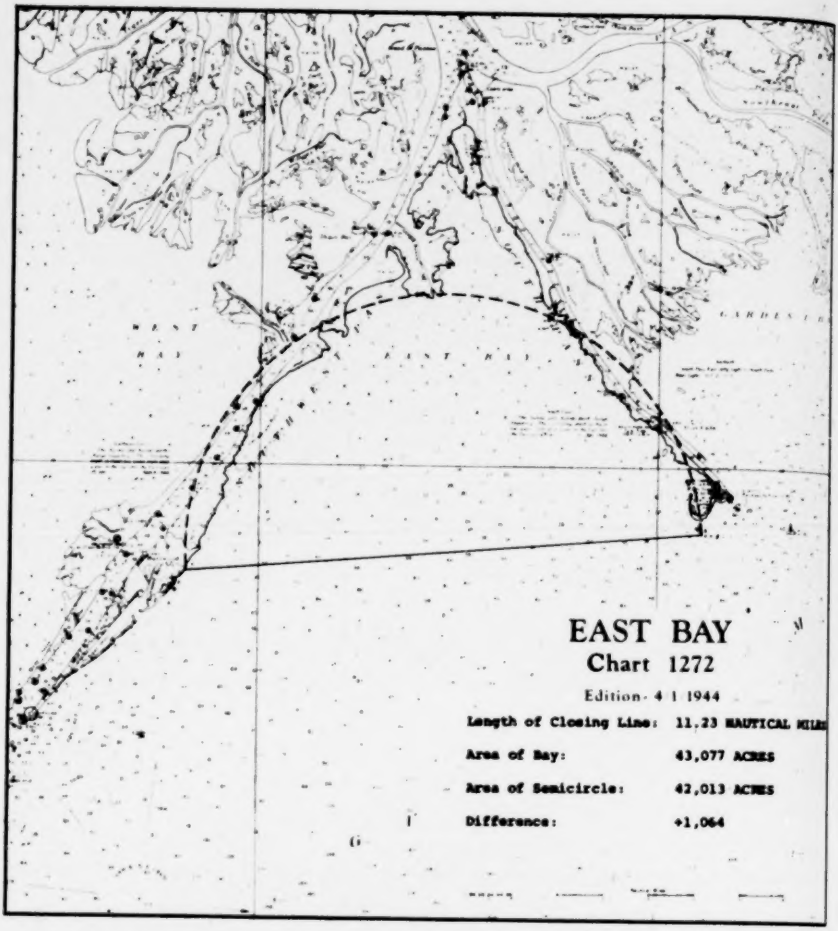


Figure 3. Portion of La. Exh. 23A showing semicircle test data for a juridical bay closure (approximating Closing Line A on La. Exh. 197 on the 4/1/44 edition of Chart 1272). This shows semicircle test data for Method 1 (approved by the Master on this chart configuration which was in effect from 1944 until 1955). Thus, on the initial accounting date, June 5, 1950, and on the 1953 date of the passage of the Submerged Lands Act, East Bay qualified as a bay. See full-size copy for low-water line detail which could not be effectively reproduced at this scale.

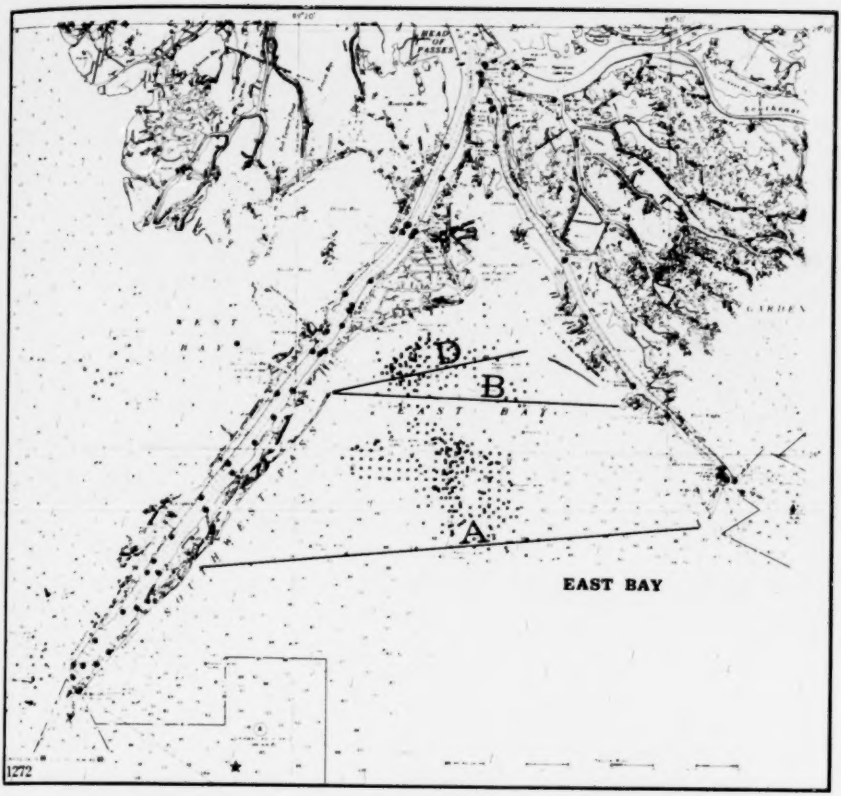


Figure 4. Reduced copy of Chart 1272 (12/6/69 edition—La. Exh. 296) showing the locations of Closing Lines A, B, and D from Exh. 197, using 1959 low-water survey configuration. See La. Exh. 197 for detail of low-water lines which could not be reproduced effectively at this scale, *e.g.*, at eastern terminus of Line D.

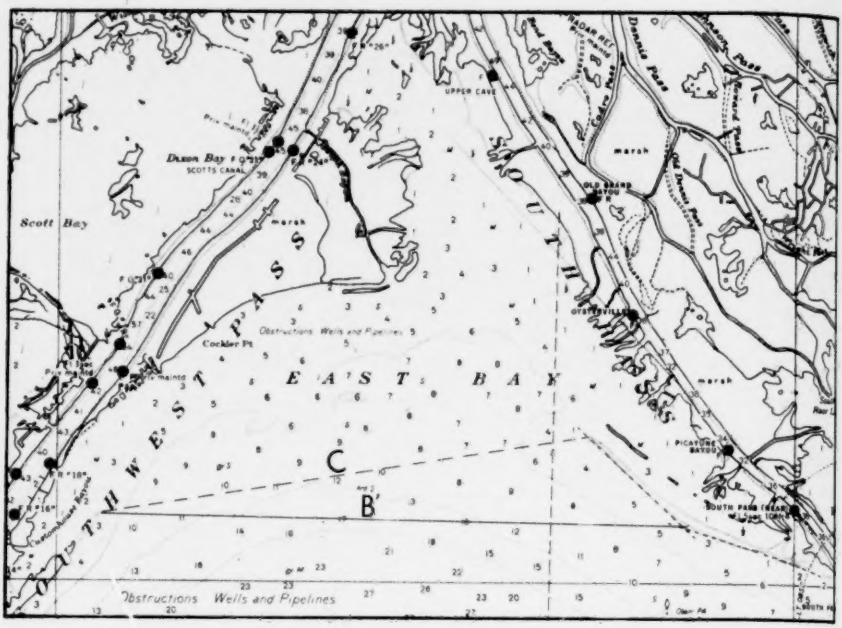


Figure 5. Portion of Chart 1272, edition of 9/17/56, showing closure [C] from La. Exh. 180 and more outward closure [B'] that satisfies all juridical bay requirements expounded by the Master, Article 7 of the Territorial Sea Convention, and the Supreme Court. See requested finding 23 and especially Figure 21 therein of Appendix I comparing the entrance points selected on Cowhorn Island by the bisector of the angle method with recognized (by the United States) uses of the bisector of the angle method at Demarcation Bay in Alaska and at Whiskey Pass on Isle Derniere where the more outward bisector of the angle headlands were employed. See also *United States v. California*, 382 U.S. 448, 451, mandating use of outermost extension of a headland form.

SUMMARY OF SEMICIRCLE TEST DATA RESULTS FROM LA. EXH. 197

PLANIMETRY METHOD	LINE A (In acres)	LINE B (In acres)	LINE C (In acres)	LINE D (In acres)
1	-4,79[illegible]	- 820 (-1,362)*	+2,578	+2,559
2	-3,010	+ 963 (+ 421)*	+3,620	+3,601
3	+ 403	+4,437 (+3,557)*	+7,855	+7,836

Figure 6. The negative and positive numbers respectively reflect the deficit or surplus acreage by which particular closing lines failed to pass, or did pass the semicircle test through use of possible area measurement systems. Method 1 was approved by the Master; Method 3 uses the Article 7 system of including islands and tributaries.
*Parenthetical data for Line B was introduced in rebuttal evidence submitted by Louisiana to deal with the federal 1970 resurvey in East Bay made immediately following a hurricane by which the government was trying to show that hurricane-associated land loss at the headlands rendered invalid the data for Line B. In rebuttal, Louisiana showed, as the parenthetical data reflects, that the results were not changed, merely the size of the margin.

mitted in rebuttal were identified as B′ and C′. The group of figures above (2 to 6) shows the location of all of these lines[45] and semicircle test measurement data.[46]

[45] With exception of C′, which is specially discussed hereafter.

[46] This data was supported by measurements and testimony of the cartographic and engineering experts and was unchallenged as to mathematical accuracy.

Other Requirements of Article 7 in Addition to the Semicircle Test have been Satisfied for All Alternative East Bay Lines

The requirements set forth in 394 U.S. 11, at 64, that any alternative closing line must not only satisfy the semicircle test, but independently qualify as a "well-marked indentation" with "identifiable headlands" which encloses "landlocked waters" were clearly satisfied as to all of these alternative lines. The former controversy about the legal question of whether these criteria must be met is moot. They have been met.[17] Thus, the Master found East Bay to be a true bay, a juridical bay, even at its outer natural mouth, Line A. He concluded that Line A would be accepted "as the area which [it] encloses has all of the other characteristics of a true juridical bay" except that it did not meet the restrictive method of area measurement which he felt bound to apply. Otherwise, he said

> If this were not the case, either due to the adoption of a more liberal method of water area measurement or due to subsequent erosion in the area established by competent evidence in the record, either

Line A or Line B would be accepted by him. Report, at 31. The issue, therefore, is the method of area measurement.

[17] Report, at 28, 31.

Line A Not Only Satisfies the Article 7 Method (Method 3 of the Report), but Until Chart Changes Were Made After this Litigation Commenced, Even Satisfied the Conservative Method Recognized by the Master

By use of the system which follows the low-water line and includes islands as part of the area of the bay, Method 3, Line A presently qualifies. Even by the erroneously conservative system excluding tributary waters and islands within the bay, Line A clearly satisfied the semicircle test until a chart change in 1956.[48]

The Restrictive Approach of Excluding Tributary Waters and Islands is Inconsistent with this Court's Prior Applications of Article 7 and Inconsistent With Leading Authorities

The Special Master frankly admitted that Method 1, which he adopted, did not use any of the water from the tributaries which enter into East Bay, the inlets which extend from East Bay to the channel of the Mississippi River. Clearly, these inlets form part of East Bay and are clearly tributary to it. See Figure 7. There is nothing in the opinion of this Court to justify the interpretation given by the Special Master, that a very restrictive approach should be used to exclude tributary waters of a bay in conducting measurements for the semicircle test. As a matter of fact, this Court employed an exactly opposite view. Not only did the Court

[48] See Figures 2 and 3 *supra*, data from La. Exh. 23A, and Appendix I, at 220-224.



Figure 7. Photograph No. 14 from La. Exh. 9 showing tributaries entering the east side of East Bay through South Pass levee.

in note 66 quote eminent authority as to the opposite view:

> "[T]he water of bays within bays may be included as water surface of the outer bay in determining the dimensions of any coastal indentation." Sovereignty of the Sea, United States State Department Geographic Bulletin No. 3, p. 11 (1965). See also 1 Shalowitz, *supra*, n. 7, at 219: "In the application of the semicircular rule to an indentation containing pockets, coves, or tributary waterways, the area of the whole indentation (including pockets, coves, etc.) is compared with the area of a semicircle." 394 U.S. 11, at 51 n. 66,

but the Court explicitly held that the waters of Barataria Bay-Caminada Bay complex could be used to

satisfy the semicircle test for Ascension Bay and Bob Taylor's Pond-Zinzin Bay-Riverside Bay complex were part of West Bay, even though these waters are separated from the outer indentation by a string of islands. Thus, the view of Shalowitz and Pearcy (the author of *Sovereignty of the Sea*) was adopted.

> We have concluded, on the other hand, that the area of "Ascension Bay" does include the Barataria Bay-Caminada Bay complex and therefore meets the semicircle test. Those inner bays are separated from the larger "Ascension Bay" only by the string of islands across their entrances.[69] If those islands are ignored, the entrance to Barataria and Caminada Bays is sufficiently wide that those bays and "Ascension Bay" can reasonably be deemed a single large indentation even under the United States approach.[70] Article 7(3) provides that for the purposes of calculating the semicircle test, "[i]slands within an indentation shall be included as if they were part of the water areas of the indentation."
>
> *********
>
> We think the same result follows in West Bay, where the areas which the United States seeks to exclude from the bay are set off only by strings of islands. 394 U.S. 11, at 52, 53 n. 71.

The comparability of the tributary waters-islands problems of the Barataria Bay-Caminada Bay-West Bay rulings of the Court to East Bay factual situations is graphically clear. For example, the "strings of islands" which set off inner bays within West Bay but which did not prevent use of those inner areas, are quite comparable to many of the stream-canal bank

remnant islands in East Bay. Compare Figure 8 showing the small openings between inner and outer bays within West Bay, such as Bob Taylor's Pond; and the "strings of islands" in East Bay, and ponds between them, Figure 9. The likeness increases when the chart treatment of the Joseph Bayou area is corrected to reflect the reality that had not been fully surveyed in 1959.[49]

The highly marginal character of the deteriorating remnants of former land within East Bay was amply shown in the record. Apart from the fact that the maze of islands around Joseph Bayou is disintegrating due to canalization, it is most difficult to distinguish land from water in the ooze of the inner portions of the bay. See Figures 10 and 11.

This and other evidence of change and marginal complexity confirmed the observations of the late Mr. Justice Black, concurred in by Mr. Justice Douglas on the marginal, exceptional and extraordinarily complex geomorphology of the Louisiana coastal facts. 394 U.S. 11, at 83, 84. In this factual aspect, and the need for practical handling of the unique marginal questions, there was no disagreement in principle in the majority opinion. 394 U.S. 11, at 62-66. The only difference between the majority and dissent was the degree to which they were willing to accommodate these special, complex needs in the interest of justice

[49] The 1959 low-water survey refrained from going into the inlets of the Joseph Bayou area, and therefore Louisiana did not fully agree as to the correctness of that survey because of its failure to fully show tributary waters.

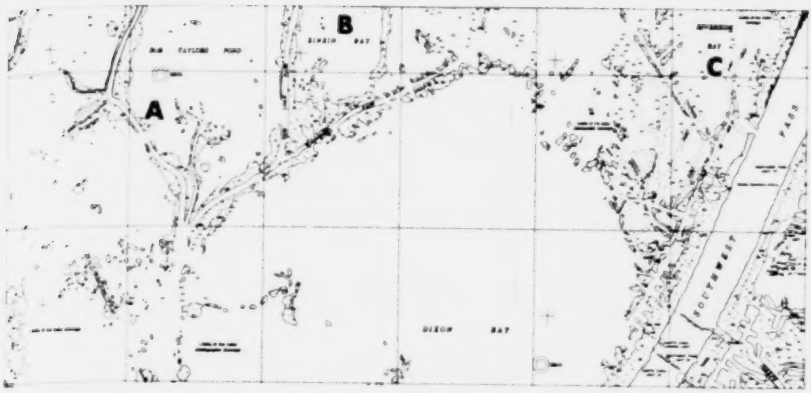


Figure 8. The size of openings into various subsidiary bays within West Bay. Note the almost solid levees separating the inner bays from the outer waters. The inner bays were held to be part of the outer bay. Compare to the tributary-island situations in East Bay in the photographs from La. Exh. 9.
A=largest opening into Bob Taylor's Pond, less than 500 feet.
B=largest opening into Zinzin Bay, less than 150 feet.
C=largest opening into Riverside Bay, less than 500 feet.

to the state and reasonable boundaries. East Bay—indeed, all of the remaining area not decided by prior decrees—is a petty fraction of the total area which was dependent on the Coast Guard Line claim. The majority refused to allow practical grounds to sustain that claim, but did not so decide other questions involving far smaller areas.

Deterioration of the Joseph Bayou Area and the Questionable "Land" Classification of the Stream and Canal Bank Remnants Prove that Line A Satisfies the Semicircle Test, even if the Restrictive Area Measurement System, Method 1, is Employed

The Report at 34 evidences a misunderstanding of



Figure 9A-B. Photographs from La. Exh. 9. Photographs Nos. 34 and 35.





Figure 9C-D. Photographs from La. Exh. 9. Photograph Nos. 36 and 40.

COPY BOUND VERTICAL



Figure 10. Characteristic deteriorating bank in Joseph Bayou area. From La. Exh. 343. See Figure 9 for aerial view of these disintegrating banks and expanding ponds, discussed in testimony of Mr. Ensminger, tr. 767-769, 783-801, which are so much like Bob Taylor's Pond.

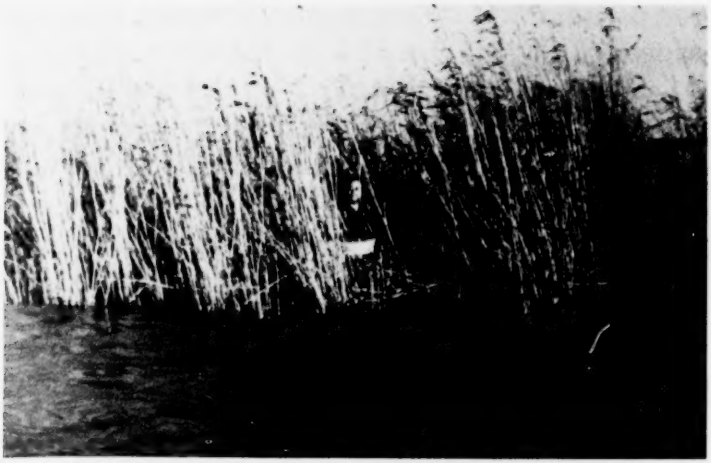


Figure 11. Photograph of "land" near mouth of Joseph Bayou, showing insubstantial watery character of the soil. The "land" is a liquid ooze and the attorney standing on it was in the process of sinking out of sight. See La. Exh. 341.

the nature of Louisiana's arguments on this point. It further confuses the problem by erroneously indicating that the "only" basis for this position is certain photographs offered in evidence late in the hearing and others attached to briefs. From this, it erroneously concludes that further evidentiary hearings would be required to establish the matter.

The simple truth is that there was ample evidence, most of it introduced very early in the hearings, from which the point is readily established, which doubtlessly escaped review in the consideration of the voluminous record. This is evident from the fact that he thought there was no evidence in the early record on the point. For example, the Joseph Bayou land mass

had not been fully developed until a survey associated with the 1956 chart change. This was shown in La. Exh. 23 early in the hearings. Figures 2 and 3 *supra* show that Line A, before the Joseph Bayou land mass was fully developed, satisfied the semicircle test by the most conservative method, that is, Method 1, which was approved by the Master. If the half-developed land mass configuration had enough water area to meet the test, the more than half-destroyed configuration should satisfy the test, even absent precise measurement of the exact extent of destruction. The Report failed to consider this evidence.

Of course, Louisiana, given continuum of change, could not conduct continuous planimetry (area measurement). But this was clearly not necessary. Nor was Louisiana responsible for the failure of the federal government to change the chart as the evidence of the reality warranted.[50]

The government's expert on international law, Dr. Henkin, would agree that Louisiana could challenge the chart's accuracy. Tr. 4936-7:

> [I]t [referring to Article 3 of the Geneva Convention] says the normal baseline . . . is the low water line . . . as marked on large-scale charts. . . .
>
> But if you read the background and the legislative history . . . this is on the assumption . . .

[50] In the other bays of the Mississippi Delta, where it is now immaterial to the oil controversy, Chart 1272 has been revised to reflect the general deterioration and disintegration of the subdeltas of land between the passes of the Mississippi River. But in East Bay, modifications of the chart to reflect subdeltaic deterioration have not been made.

> these charts relate to reality . . . if the line drawn on an official chart differed to any great extent from the tide line, a protest could be made . . . . Dr. Henkin, tr. 4936, citing Year Book of the International Law Commission for 1954, Volume 1, page 990.

The disintegrating Joseph Bayou land mass and the waters within it and other tributary waters within East Bay comprise more than the area by which Line A failed to satisfy planimetry Method 1. Clearly, it satisfied a reasonable method, indeed the method called for by Article 7 of the Convention, Method 3.[51] Clearly, this is a relatively petty matter, for which minor imprecision of data would not be significant, even if it were correct to ignore the true Convention test in applying the Submerged Lands Act. Congress, in enacting the Submerged Lands Act, certainly did not intend for this Court to interpret the Submerged Lands Act or standards under it with miserly precision. See discussion *infra*, on the Congressional intent not to be miserly about minutiae. The facts as to the deterioration of the Joseph Bayou landform, *e.g.*, its canalization and how such canalization destroys coastal marsh lands, were made clear early in the record, contrary to the Report's findings. Indeed, its early treatment explains why it was missed by the Master. See testimony of Alan Ensminger, at 767-69, 783-801 and other earlier evidence discussed below.

The Joseph Bayou landform has shown a history of deterioration over the past two decades, and espe-

[51] See Figure 6, *supra*.

cially since the 1959 survey work which did not attempt to precisely locate the low-water line within the island complex. Much evidence was introduced early in the record in Louisiana's opening case which substantiates massive deterioration since preparation of the 1959 maps. Joseph Bayou originated as a crevasse in the east bank of Southwest Pass prior to 1918 and substantially had completed outward construction of its subdelta into East Bay by the mid-1950's. La. Exh. 23; Dr. Morgan, tr. 414, 417, 419-21, 430, 432, 2686-88. Inspection of the maps, Figures 2 and 3 *supra*, show that the lateral growth was not then completed on the charts, but 1959 low-water survey (see La. Exh. 197) showed full development of the land. Subdeltas within the Mississippi River Delta have shown cyclic growth characteristics as explained in Appendix I, at 174-175. Joseph Bayou is in the deterioration phase, demonstrating extensive loss of land. La. Exhs. 4 & 5; Dr. Morgan, tr. 6291-6307.

As in the West Bay subdelta, canalization of the Joseph Bayou landform has substantially augmented deterioration of that land form. Alan Ensminger, tr. 767-69 and 783-801; Dr. Morgan, tr. 2366-70; La. Exhs. 8, 299, and 341.

Abundant evidence in the record prior to the filing of the *Louisiana Memorandum Presenting Additional Technical Data and Information Requested by the Special Master at the October 29, 1973 Conference* in November 1973 substantiates the rapid deterioration of the Joseph Bayou subdelta. Yet the Report erroneously stated that only belated or post-record evidence treated

the point. See Figures 9, 10, and 11 *supra*, for examples of evidence put in the record early in the case. La. Exhs. 8, 9 (Photos 32-41), 33-35, 193Y-AB, 229, 341 (31 photographs in one exhibit), 343; testimony of Alan Ensminger and Dr. Morgan cited *supra*.

Much of the Joseph Bayou landform is characterized even on present charts by large ponded areas separated from other waters within East Bay by only narrow strings of islands and peninsulas of land. Evidence in the record shows even greater "ponding" and spoil island remnants with much greater connection with East Bay than indicated on current charts. See, *e.g.*, photographs in Figure 9 *supra*, and discussion of the comparison of inner bays within West Bay to East Bay facts. Waters and islands north of Joseph Bayou (if not the entire "land" mass consisting of insular formations) should similarly be held to constitute a part of East Bay's water area. Compare 394 U.S. 11, at 53 n. 71.

The Use of All Tributary Waters, However Minor, is a Valid Application of Article 7 as Shown by the Official Position of the British Government, the Decision in the Thames Estuary Case, and Other Authorities

Consistent with the adoption of the Convention by the Court, Louisiana urges that Method 3 is a proper method. It measures all tributary waters up to the confluence with the Mississippi River and includes as part of the area of the bay all islands within the low-water mark, but excludes tributary waters if they are tributary to any other water body. This is derived from the

Article 7 direction to employ the low-water line. If this Court agrees with the Article 7 low-water line system of including islands and tributaries, then Line A would be the proper juridical bay closing line for East Bay as the Master recognized. Report, at 31.

The identity of Method 3 with the rule of Article 7 is proven in the *Thames Estuary* case.[52] Other than the expressions of this Court on tributary waters to be considered in determining area measurements to satisfy the semicircle test, *e.g.*, 394 U.S. 11, at 53 n. 71, this is the only adjudicated dispute that we have been able to find where a court discusses tributary waters to be considered in satisfying the semicircle test. This case arose over the proper closing lines of the Thames estuary in England. The English Court was interpreting an order which adopted relevant parts of the Convention. In calculating area for semicircle-testing possible closing lines in the Thames estuary, the question arose as to whether various tributaries should be included. This was principally the Thames River, but also included other inlets and streams such as the Swole, the River Medwey, the River Crouch, the River Blackwater, and others.[53] The Court concluded that

[52] Post Office v. Estuary Radio, Ltd., La. Exh. 283, tab 17, 3 All E.R. 663 (1967).

[53] See Louisiana Exh. 290 and Figure E-1 in Louisiana's *Original Brief* before the Special Master, Vol. III, Part 3. Although the holding in the Thames Estuary case is simply an application of the rule of Article 7(3) and does not rest upon the fact that the indentation was an estuary, Louisiana, noting many factual similarities, introduced much uncontradicted evidence that East Bay is also an estuary and is very similar in shape to the indentation at the Thames estuary. See testimony

under the Convention it should not draw a line excluding these areas and that it had to follow the low-water mark "up each river and creek so far as the tide flows and reflows" since it could not find any other logical stopping place.[54] The Court, therefore, followed the direction of the order in the Council (and the Convention) and included, for measurement purposes, the area lying between the low-water mark and the closing line even though it meant including the various tributary areas.

The holding in the *Thames Estuary* case is consistent with the practice of this Court on tributary waters;[55] it is a justification for the adoption of Method 3 and supports Line A.

Louisiana submits that this Court was correct and the Master is in error. The views of the former Geographer of the Department of State, the eminent expert, Dr. G. Etzell Pearcy, and those of the government's principal technical expert in the *California* coastline

of Dr. Morgan, tr. 366-68; Larimore, tr. 5640-42. It is important to note that in Method 3 Louisiana is not considering the waters in the passes of the Mississippi River, but only the tributary streams as they leave the channels of the passes to enter East Bay. Under the Thames Estuary case there would be much justification for using even a greater water area.

[54] In the East Bay situation, there is geographic context which furnishes a logical stopping place other than the tide line. The stopping place would be the point where a tributary ceases to be entirely tributary to the bay. Thus, Dr. Morgan recommended, *e.g.*, measuring the various streams entering East Bay from South Pass until they reached South Pass, but not to count South Pass which was principally tributary to the Gulf. Tr. 2395-7.

[55] 394 U.S. 11, at 53 n. 71.

case, Aaron L. Shalowitz, support this Court's view, that tributary waters should be used.[56] The very language of Article 7 commands use of the low-water line and further directs

> Islands within an indentation shall be included as if they were part of the water area of the indentation.[57]

Line A should therefore be adopted as the closing line for East Bay as a juridical bay extending between coordinates X = 2,697,850, Y = 117,200 on the east, and X = 2,624,995, Y = 108,700 on the west.

The Special Master's Report, While Recognizing that the Coastline is Ambulatory and its Changes Should be Determined Since June 5, 1950, Nonetheless Failed to Apply His Findings to the Configurations in East Bay that were Extant Until 1956 Chart Changes, which Satisfied the Highly Conservative Area Measurement System (Method 1) Approved in the Record

Given the kalideoscope of change in shorelines the Master faced, it isn't surprising that an oversight occurred in applying the standards he approved. While

[56] "The water of bays within bays may be included as water surface of the outer bay in determining the dimensions of any coastal indentation." *Sovereignty of the Sea*, United States State Department Geographic Bulletin No. 3, p. 11 (1965). See also 1 *Shalowitz*, *supra*, n. 7, at 219: "In the application of the semicircular rule to an indentation containing pockets, coves, or tributary waterways, the area of the whole indentation (including pockets, coves, etc.) is compared with the area of a semicircle." 394 U.S. 11, at 51 n. 66.

[57] For other authorities on use of tributary waters and islands, see materials cited in Appendix I, at 242-250.

he recognized Method 1 and his obligation to apply the Convention for each significant change since June 5, 1950 to the present, he failed to recognize that East Bay Line A satisfied the test he approved until 1956, although the evidence was uncontroverted on the point. Until the 1956 chart change on Chart 1272, the line corresponding to Line A extending from the tip of South Pass to the "hump" on Southwest Pass, satisfied the semicircle test. See Figures 2 and 3 *supra*. This was uncontested data and employed the system approved by the Master in his Report, the system of closing off tributary waters. Examination of the overlays in La. Exh. 23 and 23A shows that Method 1 was used.

Leases were granted by the State of Louisiana prior to the 1956 change in the chart, and prior to any injunction. The Master has failed to make an important factual finding. No ruling of this Court requires that a party must sacrifice past proceeds of mineral leasing in areas lost by shoreline or chart change. It was for that reason that the parties agreed that an important issue in the case was to determine

> Have there been changes in the coast line that would affect the future distribution of revenues heretofore accrued since June 5, 1950 and, if so, when did the changes become effective?

See Report, at 58, Appendix A-1, Issue 6 (e).

Thus, even if the Convention method is rejected and Method 1 accepted by the Court, Line A should be recognized until 1956.

If the Court Should Approve the Use of All Tributary Waters but not Approve the Use of All Islands Seaward of the Low-Water Line for Measuring Area Under the Semicircle Test, Then at Least Line B Would Qualify as a Closing Line for East Bay

The arguments for Closing Line A also support Closing Line B. The only significant difference between Closing Lines A and B relates to Line B being the more inward alternative line, between clearly identifiable headlands, which satisfies the semicircle test even without the use of all islands as called for in the Convention.

Closing Line B data is reflected in La. Exh. 197, and in Figure 6 *supra*. Not only does this line satisfy Method 3; it also satisfies Method 2. The difference between Method 2 and Method 3 is essentially that Method 2 does not rely upon the use of all islands, especially those of the Joseph Bayou area. Method 3 counts both tributary waters and islands within the bay. (See arguments *supra*.) We have amply demonstrated that Line A satisfies the semicircle test, especially in light of this Court's West Bay precedent. In the event the Court should differ and decide that islands in East Bay should not be counted, then it would be appropriate to recognize Closing Line B.

Even if Line B Were to be Rejected, Lines B′ and C′ Qualify

Lines B' and C' are two other alternative lines in the vicinity of Line B. The Court might approve

either of these lines if for any reason Line A were rejected. See Appendix I, at 225-229 and 241, and materials cited therein.

The Master recognized that it was conceded that both of these lines satisfied the semicircle test. See Appendix I, at 227, paragraph H, quoting a federal government memorandum in response to a Louisiana memorandum submitted to the Special Master on technical data pertaining to these lines in which the government admitted:

> Our calculations show that each of these lines [B', C, and C'] satisfies the semicircle test.

If the correct editions of Chart 1272 are examined, headland reasoning used to reject these lines is unsound. This suggests that an erroneous federal map illustration confused the Master. See Figure 12, showing how consolidation of several alternatives on a single map could have misled the Master, since the alternatives related to maps of different dates showing different shoreline changes.

The Report incorrectly reasoned

> . . . neither of these closing lines has a western terminus that qualifies as a pronounced headland helping to enclose landlocked waters. Closing Line B' suffers the additional objection that its eastern terminus is located at approximately the center of Cow Horn Island by applying the so-called "bisector of the angle" method, a technique entirely inappropriate in the physical situation, as there are pronounced headlands in the vicinity. Report, at 32.

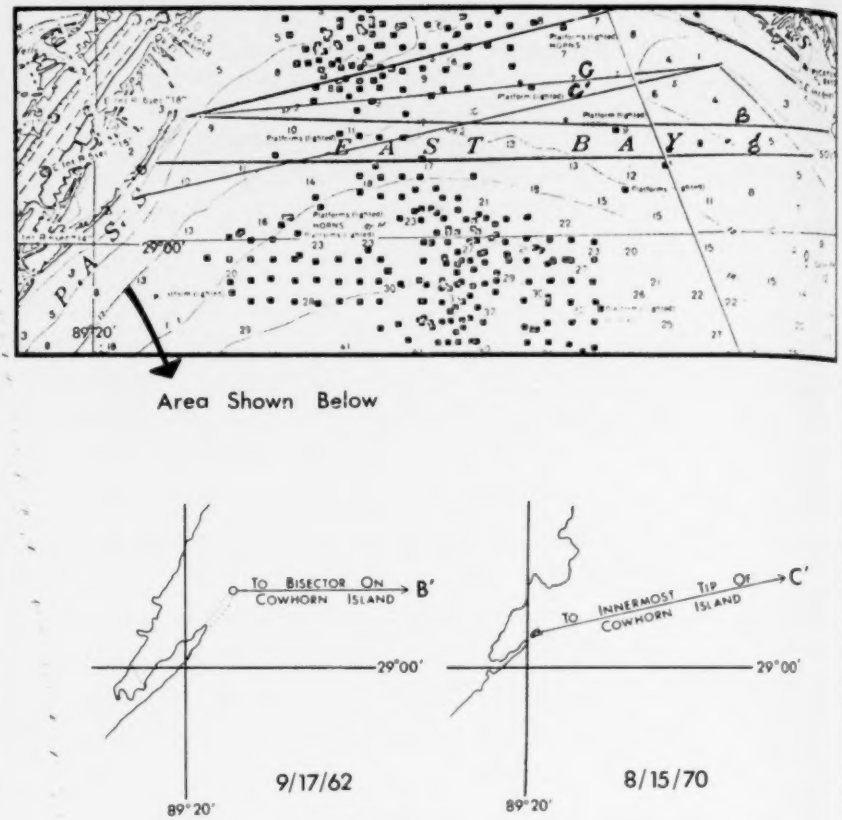


Figure 12. The top map is a reproduction of a cartographic exhibit from the federal memorandum brief to the Special Master, incorrectly representing that Lines C' and B' used the 1968 chart and terminated on flat shore line. Showing the lines on charts which are the bases of the C' and B' claims proves the contrary. See the sketches of the lines at the western headlands on 1962 and 1970 charts.

Cowhorn Island, the eastern headland, has essentially the same pronounced character as the sharply pointed western headland, a peninsula jutting northeasterly into East Bay from the Southwest Pass banks. See Figures 12 and 5.

In spite of this nearly identical shape of eastern and western termini, the Master found Cowhorn Island is a pronounced headland and at the same time inexplicably declared that the identically shaped western peninsula headland was not a pronounced headland. The eastern natural point on Cowhorn Island for Line B' selected by the bisector of the angle method was rejected because Cowhorn Island presented a pronounced headland at its tip. This seemingly self-contradictory aspect of the Report can only be explained on the basis of an examination of the wrong map, for the peninsula on the west side is equally as pronounced.

It is certainly true that the bisector of the angle method has been recommended for situations where there is an absence of a pronounced headland. 1 Shalowitz, *Shore and Sea Boundaries*, 64. But no authority has been suggested to deny that when a pronounced headland has a gently rounded and featureless shore that forms a more outward entrance point that the bisector of the angle method should *not* be employed to ascertain the outermost extension of that headland. See illustration in 1 *Shalowitz* at 64. This rule calling for the selection of a natural entrance point on a natural headland which constitutes an outermost extension of it was applied in favor of

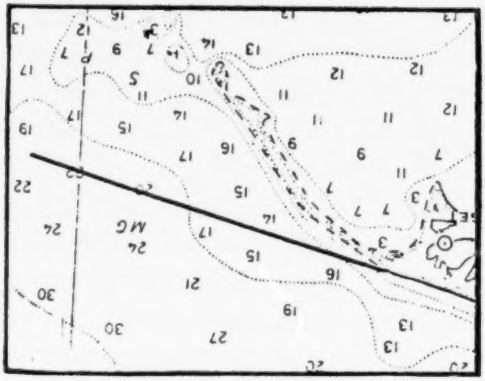
the State of California by this Court and applied as to Alaska by federal agencies. The State of Louisiana should be treated equally.

> In drawing a closing line across the entrance of any body of inland water having pronounced headlands, the line shall be drawn between the points where the plane of mean lower low water meets the outermost extension of the headlands. *United States v. California*, 382 U.S. 448, at 451.

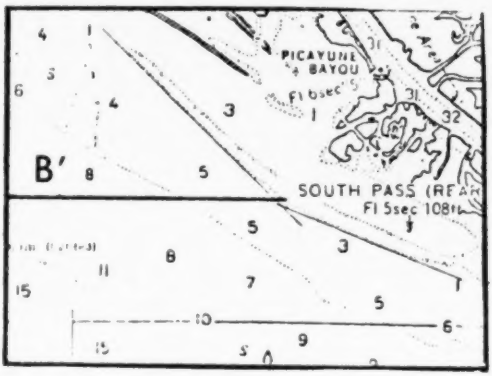
Cowhorn Island is a pronounced headland, as is evident from the Master's approval of Line C. Thus, the outermost extension of it or the outermost natural entrance point on it (even one established by the bisector of the angle method) should be employed. Certainly, the Justice Department, the Geographer of the Department of State and all other affected agencies of the federal government have agreed this is so for Alaska. Compare the Demarcation Bay precedent from U.S. Exh. 416D to the Cowhorn Island situation in Figure 13.

The Louisiana alternative, B', came about by way of rebuttal response in the proceedings before the Special Master to federal attack on Closing Line B. The challenge to Line B erroneously failed to appreciate the alternative character of the contention arguing that the headland it employed at South Pass was improper because the line crossed the low-water elevation known as Cowhorn Island.[58] Louisiana re-

[58] Actually, this reasoning would cause Line B to satisfy Method 1 by greatly shortening the closing line. See Article 7 (3) calling for use of the distances between inter-



(1) Demarcation Bay.



(2) East Bay Line B'.

Figure 13. Comparison of (1) bisector of the angle natural entrance point of the Geographer of the Department of State approved for Demarcation Bay in Alaska by Interior, Justice State, C. & G.S. and other federal agencies, with (2) bisector of the angle natural entrance point selection on Cowhorn Island for Line B'. Note that in both instances a sharper, more inland closure is not employed, but the more outward identifiable, gently rounded point is selected. See U.S. Exh. 416D, Chart 9478 and Figure 21, Appendix I.

sponded by pointing out that a line, B', situated almost identically, satisfied the bisector of the angle method. Thus, even if Cowhorn Island were found to be present, Line B or its substantial equivalent, Line B', had a satisfactory eastern headland as well as satisfying the semicircle test. Line B and its near equivalent, Line B', are really supported by the presence of two aligned headlands, one on Cowhorn Island and one on the East Bay shore of the South Pass bank. The federal attack on it only served to establish that it satisfied Method 1 as well as Method 2 area measurement.

As discussed in the section *infra* concerning Cowhorn Island and the unfair post-hurricane 1970 resurvey which led to revisions of Chart 1272, Louisiana contends that Cowhorn Island's continued existence should be recognized and the shoreline configuration changes made on Chart 1272 in the December 6, 1969 and 1970 revision should not be given effect. See Appendix 1, at 237-240, and especially subparagraph D at 239 referring to technical evidence establishing the unfairness of the post-hurricane survey which was used to change the chart.

In addition to pointing to the unfairness of a post-hurricane survey, Louisiana submitted evidence as discussed *infra* showing additional reasons why Cowhorn Island's continued existence should be recognized, such as the fact of its counsel-directed removal, the routine, deliberate consideration and re-

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vening islands and excluding the distance across the islands for computation of the diameter of the test semicircle.

jection of the 1959 low-water survey results by the Marine Chart Division soon after the survey and the affirmative effect of the aerial photography interpreted by the expert, Mr. Buttorff. Consequently, it is conceivable that the Court might rule in favor of the continued recognition of Cowhorn Island while yet otherwise accepting the 1970 Coast and Geodetic Survey change in Chart 1272 in areas removed from Cowhorn Island. The western terminus of Line C' is a headland selected on the post-1970 chart revision and since the line therefore related to two different maps at its opposite termini, it could not be correctly illustrated on a single chart as was attempted by the federal government in a composite illustration at page 14 of a memorandum filed with the Special Master entitled, *Memorandum of the United States in Response to Louisiana Memorandum Presenting Additional Technical Data. . . .* This illustration had confusedly shown a maze of alternative lines criss-crossing each other and Line C' as terminating at a point on a flat shore line configuration. See Figure 12, a reproduction of this erroneous map from the federal technical memorandum. The error pertains, not to the location of the line, but to the implied misrepresentation of this illustration that the line terminated at a point where there was no pronounced headland. This erroneous impression was achieved through using as a base map the 1968 edition of Chart 1272. Of course, the 1968 chart did not reflect the earlier chart location of the sharp point at the tip of the peninsula that runs northwesterly along the East

Bay shore of Southwest Pass on the earlier and later editions of Chart 1272. The termini of Lines B' and C' are reflected on the correct charts in Figures 5 and 12. These figures show that B' and C' in fact have western termini that are pronounced identifiable headlands on the charts to which the alternatives related. For the 1968 chart configuration Louisiana had presented data for B' using not the flat shore of the peninsula's side, but its tip at X = 2,644,940, Y = 134,910. See Appendix I, at 241 paragraph 30 and materials referred to therein.

If More Outward Closing Lines are not Recognized, Three-Mile Projections From Cowhorn Island and a Closing Line Employing It (Line C or C') are Justified as the Existence of Cowhorn Island on Large-Scale Charts, in Fact, Had Been Amply Proved, if Unreliable Survey Evidence is Rejected and if Chart Changes Made to Affect the Litigation are Ignored

The Special Master found that Cowhorn Island existed until December 1969. Cowhorn Island forms a shoreline for the projection of 3-mile arcs if the more outward Lines A and B are not recognized. Additionally, it forms the eastern headland for Line C approved by the Master. See Report, at 33-34. It had long been reflected on nautical charts and surveys of the coast and its existence had been repeatedly established by hundreds of soundings in various hydrographic surveys. See, *e.g.*, the charts collected in La. Exh. 23, editions of 1918, 1924, 1925, 1935, 1944, 1955, 1956, through the numerous revisions of the charts in the

1960's made after deliberate consideration and rejection of the significance of its alleged non-appearance on the 1959 photo-survey. See testimony of Mr. Richardson of the Marine Chart Section, U.S.C. & G.S., La. Exh. 123.

This is the survey which was the subject of the government claim in this lawsuit that a 1959 high altitude photographic survey did not show the low-water elevation known as Cowhorn Island or Cowhorn Reef. It was not found in hasty helicopter flights in 1959; therefore, the government contends it did not exist since 1950. Louisiana had shown that Cowhorn Island had continously appeared either as a low-water elevation or an island on the official Coast Charts, 194 and 1272, from 1918 until it was removed at the direction of federal counsel on December 6, 1969. The removal occurred one day after a December 5, 1969 pretrial conference fixing the issues in the Special Master proceedings and within a few weeks of the October 29, 1969 Wraight-Richardson depositions at U.S.C. & G.S. offices in Rockville, Maryland, which dealt with the area and surveys proving its existence. See La. Exh. 123. The depositions had revealed Louisiana's reliance on the official chart and the December 5, 1969 pretrial conference had fixed the issues.

The principal government justification for the December 6, *1969* deletion of the area, as argued in briefs before the Special Master, was a January *1970* resurvey and field inspection made after Hurricane Camille struck the area as well as the testimony

of the field inspection party chief involved in the 1959 and 1970 work, a federal employee.

Joseph K. Wilson, the U.S.C. & G.S. field inspection supervisor of the 1970 survey, admitted under cross-examination that coastal survey work following a major hurricane does not fairly reflect normal conditions of the shore because "the hurricane changes everything." Tr. 4677.

Yet, this anomalous, temporary shoreline condition was urged as a basis to sustain the chart revisions, even though continued existence of Cowhorn Island had not been disproved, certainly not by the highly reliable type of hydrographic work which had initially shown its existence, and not by normal, safe charting practice. Literally, thousands of soundings had been made in the hydrographic survey showing Cowhorn Island's earlier existence above mean low-water levels. See La. Exh. 123, Richardson-Wraight deposition, map R-5, showing the thousands of soundings made to locate this low-water elevation and used to place it on the charts precisely.

By contrast, one—just one—accurately located sounding was made at the alleged location of the feature in the January 1970 survey to justify the December 6, 1969 removal. See U.S. Exh. 200, Survey Area 6 discussion of sounding 6B at pp. 1, 4.

For navigational safety, normal practice would not have justified removal from a chart of a low-water elevation proven by hydrographic survey, on the basis of subsequent less reliable photogrammetric

survey and spot field inspection techniques. Indeed, before the depositions and the later conference revealing Louisiana's reliance on the configuration shown on Chart 1272, the Marine Chart Division had itself rejected the 1959 photogrammetric and aerial field inspection work, preferring to continue to show Cowhorn Island and other low-water elevations on the chart. This was deliberate, even though not found in the photogrammetric survey field work of 1959. Normal charting practice preferred the greater reliability of hydrographic surveys and the need to be safe and conservative in removing low-water elevations from charts.

See deposition of the expert from the Marine Chart Section of the U.S.C. & G.S., Mr. Richardson, La. Exh. 123, pp. 99-100, 120-123, regarding the fact that the U.S.C. & G.S. had routinely *not* removed Cowhorn Island and other low-water line configurations from Chart 1272, after considering the 1959 topographic-photo survey work, pursuant to the normal safety practice of good chart work. That the change came about by direction of counsel is revealed by sworn cross-examination:

> Q. Now, isn't it true, sir, that the change that occurred in chart 1272 when Cowhorn Island was taken off of chart 1272 in the December 6, 1969 edition and certain other [contested landforms] shown were also taken off, that that change came about as a direct consequence of suggestions not initiated by the Marine Chart Section, but initiated by legal coun-

sel following the deposition I took from you and Dr. Wraight in Rockville, Maryland?

A. This is true, Mr. Hugh Dolan of NOAA staff, who is legal adviser for National Ocean Survey, *told us, Marine Chart division to remove these areas* from the charts.

Q. Thank you.
No further questions.
Tr. 5113-14. [Emphasis added.]

In legalistic fashion, the December 6, 1969 change in Chart 1272, to delete Cowhorn Island, was voluminously documented by statements of what was *not* seen in the 1959 survey, approved by people who were not there at the time or who had never been there. Such statements were made or approved ten years later, mostly by people who hadn't ever seen the Mississippi Delta and who were not subjected to cross-examination. A Mr. Wilson was the only real eye witness to the inspections made at mean low-water, in a few brief minutes in 1959. He was the 1959 federal survey party chief. Mr. Wilson swore that he had made no notes on field inspection photographs used in his low-water inspections, where his inspection at low-water showed no land exposed at low water. Tr. 4673, 4676. The very purpose of his inspection was to ascertain whether doubtful or controversial areas existed above low water. See tr. 4669. On cross, Mr. Wilson confirmed that in the particular case where he located no land, he made no notes.

CROSS-EXAMINATION

BY MR. ELLIS:

Q. Was it your testimony, sir, that if you found

out that there was not a location that you made no notes?

A. I made no notes in that particular case.

Q. And you made no notes in that particular case because you considered it was not significant?

A. Because I had checked it very thoroughly, sir.

Q. But you didn't consider that significant enough to make any notes of that which you had checked very thoroughly and which you have stated was the purpose of your mission, you made no notes about that, the prime purpose of your mission?

A. I made no notes. Tr. 4676.

This incredible testimony was contradicted by the notes on the inspection photographs the Special Master had before him. See U.S. Exh. 7 which contains behind Reference Map No. 7 copies of the field inspection photographs, initialed by Mr. Wilson, and showing the inspection notes made by him. Photo 8983 shows two notations reading "covered at LW," and similar notations appear on photos 8985, 8989 (three places) and 8727, all made by this witness. *But no such notation was made for the Cowhorn Island locale* or other contested points shown on Chart 1272 but not shown on the 1959 photogrammetric survey, *only at other points not subsequently contested by Louisiana.*

In sharp contrast to this reliance on the absence of information, Louisiana introduced positive evidence to show that the infrared photographs in 1959 tended to confirm the continued existence of land at low water

at the Cowhorn Island locale and at other important marginal locales which were contested. Mr. Curtis Buttorff is an independent, highly experienced, infrared interpretation specialist, then employed by Geophoto Services, Inc., a subsidiary of Texas Instruments. He was not an employee of a litigant, like the government witnesses, but rather an independent expert, with experience in the Mississippi Delta and coastal photomapping experience throughout the world. See tr. 1872 *et seq.* on the background of this expert. Mr. Buttorff testified, tr. 5863-65, the survey photographs showed wave action or other phenomena in the vicinity of Cowhorn Island and other low-water configurations which Chart 1272 continued to reflect until removed in 1969. This indicated the possibility of land at or near the water surface, which may have been slightly covered with water, due to meteorological or wave phenomenon. (Long waves may immerse narrow spits or islands at the moment a picture is taken.) Mr. Buttorff concluded that although the photographs did not alone definitely establish presence of land above the low-water datum at the locations in question, they tended to confirm rather than refute the prior hydrographic survey work showing land above the mean low-water datum at these locales. Land above mean low water may be frequently submerged and cause wave action over it.

One eye witness, a wildlife biologist, flew the area twice monthly every year to conduct wildlife counts during the 1950's. This witness testified to the fact of frequently counting thousands of blue and white geese

on the island during the seven-year period he made wildlife surveys in the 1950's. See testimony of Mr. Richard Yancey, tr. 1252-1259, and La. Exh. 8, showing markings of the witness.

Federal experts have established facts which show that a random daylight observation of land is very probably an observation made when the water stage is higher than low water. Low-water tides normally occur only at night along the Louisiana coast, except in December and January. See Jones and Shofnos, "Mapping the Low Water Line of the Mississippi Delta," XXXVIII International Hydrographic Review 63, at 71 (1961):

> . . . most low tides reaching mean low water, or below, occur at night.

Messrs. Jones and Shofnos reported that, statistically, only five days from November through January could be expected when low tide and flying and photographic daylight conditions would be present simultaneously, and these were subject to "a wild card in the deck—the wind." The Court will readily understand that it is not easy to produce an observation or photograph of a low-water elevation, but when one is produced, it is weighty evidence of the existence of the low-water elevation, since they are normally invisible in daylight in Louisiana conditions except for waves breaking over them.

Thus, the wisdom of normal safe charting practice is evident. Low-water elevations proven by hydrography should continue to be recognized until clearly

and positively disproved by survey work of equal dignity.

Chart standards are commanded by the Convention, Article 3, and this Court directed use of that Convention's standards. 394 U.S. 11, at 35. The difference in the 1959 *mapping* standards and the *charting* standards of the U.S.C. & G.S. was explained in U.S. Exh. 200, Appendix D, at p. 31.

> Before getting into specific instances, it is important to re-emphasize that the maps compiled in 1959-60 were developed for the purpose of accurately delineating the mean low-water line as it existed *at the time of the survey*, while nautical charts are published to show the necessary data for safe and efficient navigation *over a period of several months or years*. Thus the *chart compiler will always lean to the side of safety in compiling or deleting data affecting safe navigation.*
>
> It is the policy of the Coast and Geodetic Survey to retain charted features affecting safe navigation *until their existence is positively disproved by field inspection.* [Emphasis added.]

A major difference between charts and mere maps was explained by the U.S.C. & G.S. geographer, an expert on geographic nomenclature, Dr. A. Joseph Wraight, in his deposition. Charts are for navigation and therefore use compiled hydrographic survey data and not merely topographic data. See La. Exh. 123, p. 7-8, and 32.

Thus, charts are a summary of a "motion picture" and should show conditions over long periods. They

must therefore err on the side of safety, showing marginal cases as land above mean low water, whether or not precise "still camera" methods could prove contrary information as of a moment in time. The Court has decreed that there is to be an ambulatory boundary, but ambulatory by the standards of the Convention—normal, gradually changing *chart* low-water lines. Surely, the Court did not mean that after each hurricane or each flood, each side should quickly survey the abnormal conditions to "disprove" the more normal, safe, permanently oriented chart shoreline.

Obviously, the question of whether a chart is correct should not be judged by the still-camera inadequacies of post-hurricane photo-grammetric surveying. Rather, reasonableness over time should be the standard. Indeed, that was the standard, until legal direction resulting from oil litigation replaced normal concern for safe navigation.

The December 6, 1969 chart revision change, it will be recalled, was made after depositions showing Louisiana's reliance on Chart 1272 configurations and immediately after the December 5 agreement on the issues, which agreement referred to the December 5 chart configurations. The January 1970 resurvey, again not using correct hydrographic survey methodology, was made soon after a hurricane struck the area and it takes years for normal conditions to be reconstituted after a hurricane. The worthlessness of the survey for showing normal conditions is apparent by the admissions made by the survey party chief under cross-examination to the effect that survey work after

a major hurricane does not reflect normal conditions of the shore. Tr. 4677. See also Appendix I, at 237-240, and especially subparagraph D at 239, citing scientific studies and reports in La. Exh. 283 (13).

For these reasons, we contend that the Special Master was correct in finding the presence of Cowhorn Island until December 6, 1969, but erred in not finding it existed after December 6, 1969. Self-serving action by the federal government during the pendency of this litigation should not subvert normal chart standards, and the government should be signaled by this Court that it cannot thus toy with safety.

Louisiana suffers enough from hurricanes without having to suffer loss of its inland waters after each hurricane through unfair surveys which exploit temporary disaster conditions, such as those caused by Hurricane Camille. The January 1970 resurvey was made only 5 months following passage of Hurricane Camille, "one of the most intense storms in recorded North Atlantic tropical cyclone history" (La. Exh. 283(13), p. 5) through the delta area. Wright, Swaye, and Coleman of the Coastal Studies Institute, commenting on the effects of Camille in the delta area stated:

> Most landforms—certainly most depositional landforms—are primarily the product of normally occurring processes which act with regularity and high frequency. However, occasional catastrophic events may modify a landscape to the extent that normal processes, once they resume, act upon a different set of "initial" conditions. In

> such a case form-process equilibrium will eventually be regained, but only after changes in the precatastrophy morphology have taken place. La. Exh. 283(13), p. 13.

These changes in the pre-catastrophe morphology take extensive time to be fully effected and in fact have been in the process of occurring. However, while giving effect to the post-catastrophe 1970 survey, the Master would not permit later photographs to rebut it or show long-term impact of the hurricane. See Report, at 34, denying Louisiana the right to use the recent photographs which "do show substantial erosion" in the Joseph Bayou area and Line A arguments, *supra*. The inequity is emphasized by the admission of the 1970 federal survey chief that a post-hurricane survey does not fairly reflect normal conditions. Tr. 4677. The inequity is compounded by the testimony of the U.S.C. & G.S. experts that a chart should err on the side of safety and reflect relatively normal conditions over long periods of time. See U.S. Exh. 200, App. D, p. 31.

The inequity is contrary to Article 3 of the Convention, mandating use of chart low-water line standards, for the "normal" baseline.

The inequity is the kind of small thing with which this Court and Louisiana have been unreasonably burdened, and which the late Mr. Justice Black and Mr. Justice Douglas styled "technical and wasteful." 394 U.S. 11, at 78 n. 2. This and future petty detail can be made moot through recognition of historic claims or more outward Louisiana juridical positions.

The Master's Report is Self-Sustaining on Line D

The Master's Report is thoroughly self-sustaining on Line D, a more inward alternative that must be respected if the Convention is to have any application in the case at bar. See Report, at 34. It is purely an alternative and need be considered only if the more outward claims are rejected.

EAST BAY SUMMARY

Line D is the last and most inward of Louisiana's East Bay alternative contentions, which are numerous, complex, and operative only if each successive outer alternative is rejected. See Appendix III for a synopsis of these contentions with appropriate closing line descriptions. The East Bay juridical problems would be simply resolved by use of the Convention's Article 7 (Method 3) system of semicircle test measurement and resultant acceptance of Line A. Even that problem need not be decided if Louisiana's "point to point" historic claim is accepted.

The alternative exception of the syllabus concerning the termination date of the recognized inland character of the outer portions of East Bay is important for two reasons. First, it supports Louisiana's historic claims, for the evidence is clear that by the most conservative approach, East Bay was a bay before and after the inception of this controversy, on June 5, 1950, the date accountings commenced, and in 1953 when the Submerged Lands Act was enacted. Secondly after June 5, 1950, accountings will need to consider changes, if any, in the boundary. It is submitted that chart

changes after the filing of this suit should not affect Louisiana adversely without its consent.

ASCENSION BAY

The Report Should Be Adopted as to Its Findings That the Ascension-Caminada-Barataria Bay Complex is an Overlarge Bay within the Meaning of Article 7 and that a 24-Mile Baseline Should be Drawn Between the Coordinates X = 2,406,890, Y = 189,733, and X = 2,550,402, Y = 216,158

The Special Master's findings, Report, at 45-46, are correct and require no further elaboration. It is premature to anticipate the need for a reply to exceptions which should not be taken by the government.

FOURTH EXCEPTION

TREATMENT OF ISLANDS

The State of Louisiana further excepts to the Special Master's failure to correctly and fully use applicable legal criteria for treatment of islands as part of the mainland and for the determination of natural entrance points of bays. These errors have caused the Special Master to fail to recognize more seaward closing lines for recognized juridical bays, including Bucket Bend Bay, Blind Bay, Garden Island-Red Fish Bay, and Atchafalaya Bay.

General Errors

The areas which are the subject of this exception are treated in the Report, at 35-42 and 52-53. Major errors include treatment of certain mere factors not only as rigid tests or requirements, but also as *cumulative requirements, all* of which had to be satisfied. This led the Master to reject as "immaterial," Report, at 39, the strong authorities the Court had cited relative to the special consideration to be given fluvial islands. Fluvial islands are built from the mainland, indeed their very materials are derived from the mainland and ultimately they unite with the shore, whether they be ordinary river mouth islands or remnants, or the classic "mudlump" fluvial islands involved in *The "Anna."* See *e.g.* Appendix I, at 172-179, 231-234.

Another significant error rests in the interpretation given by the Master to *The "Anna"* (1805) 5 C. Rob. 373, Report, at 39, and to this Court's special

treatment of that case and similar authorities. The Court had presented a very strong discussion favoring use of mudlump islands and recognizing the strong authorities favoring use of river mouth islands. All of this law had its roots in *The "Anna"* as this Court's analysis in note 84, 394 U.S. 11, at 64, 65 suggested. The discussion by the Court and the language it used had been so strong, quoting *The "Anna,"* and several major writers, that it seemed implicitly to favor using *any* fluvial island or mudlump island, merely because it was fluvial. It was this implication that the Court was attempting to avoid when it said that the discussion should not be taken as suggesting that every mudlump island is part of the coast and that origin is one consideration.

Somehow, the Report would change this flexible limit on the importance of an obviously major factor into meaning that practically *no* mudlump or fluvial islands should be treated as part of the mainland, or that the major factor should be ignored if a single minor factor is not found.

The Report also ignores the historic waters nexus of *The "Anna"* with the geographic problem. We are not merely discussing *The "Anna"* as a precedent that governs identical facts. (See Figure 80B in Louisiana's *Reply Brief* before the Special Master.) We are discussing the very waters, the very area, the almost exact islands and pass of the Mississippi River, the same geographical configuration for which an *American ambassador appeared in the British Courts and laid claim of American territory.* If ever there was a valid his-

toric claim, this is it; for there was an assertion of jurisdiction, a formal judicial proceeding and a concurrence in the claim by the courts of a foreign sovereign whose decrees that sovereign enforced. Then, for more than eight score years, courts and doctrinal writers on international law around the world have recognized the importance of the case. See Appendix I, at 178.

The Court did not merely cite authorities but used its own language:

> . . . it is ancient lore that islands created by sedimentation at river entrances are peculiarly integrated with the mainland itself . . . . 394 U.S. 11, at 65 n. 84.

Of course, the Court knew that the Convention now had to be applied. Indeed, the very reason the Court discussed early authorities and writers was that the Convention was silent and it was reasonable to consult established custom, precedent and authoritative sources for guidance *in applying the Convention.* It is incomprehensible that note 84 of this Court's opinion should be interpreted so that nearly a page and a half of a strong discussion is summarily dismissed, on the basis of a short paragraph. It is ironic that the paragraph was intended to prevent the very strength of that discussion from causing any sole factor always to govern, for the Report uses the paragraph to contend that a *single* factor which is not satisfied will always control the question, if answered negatively to a state's interest.

The error of the rationale is further evidenced by

the fact that this Court directed that the Master would be free to consider "any evidence he finds it helpful to consider." 394 U.S. 11, at 66. If failure to satisfy any one of the specifically enumerated factors were fatal, under the intendment of the Court's holding, then it could not be said the Master was to be free to consider any other relevant criteria or helpful evidence. Other criteria or evidence then could not be "helpful" or "relevant."

Louisiana submits that the Court was not commanding an objective, rigid test or set of strict requirements. Indeed, the Court said there was little "objective guidance," 394 U.S. 11, at 66. Plainly a rigid objective formula in which all factors mentioned had to be satisfied was not intended, for if all of the criteria were rigid, cumulative *requirements*, the Court would not have used terms such as "factors," "realistically," "illustrative," "consideration" and other similar words suggestive of flexibility. A rigid, mechanistic, cumulative formula that was open-ended for further "add-ons" of additional, yet undefined, strict requirements is inconceivable. It is true the Court said the factors were illustrative rather than exhaustive, but they were only what the Court called them—factors, not cumulative, rigid requirements, as the Report would have it. We do not quarrel with the merely illustrative nature of the factors for it emphasizes their flexible character.

The Master, while initially styling these factors as guidelines, ended up interpreting them as a "test" with criteria, *all* of which had to be satisfied but which if

satisfied would nonetheless *fail* to prove islands should be treated as part of the mainland!

> While it is true that the Court leaves open the possibility of considering other relevant criteria and states that the list given is intended to be illustrative rather than exhaustive, this appears to be intended to leave open the question of whether islands or low-water elevations which meet the five suggested specific criteria may nevertheless fail to qualify as parts of the mainland rather than to suggest that islands or low-water elevations which fail to meet one or more of these specific tests may nevertheless be so assimilated. Report, at 37.

If anything, the "illustrative rather than exhaustive" footnote of the Court in 394 U.S. 11, at 66 n. 86 must have been intended to correlate back to the Court's language:

> And it is ancient lore that islands created by sedimentation at river entrances are peculiarly integrated with the mainland itself . . . . 394 U.S. 11, at 65 n. 84.

This strongly implies that the single positive factor of the fluvial origin of river mouth islands might *always* override other considerations due to the "peculiar" treatment long afforded them. This is *not* language suggesting that a single negative factor should always predominate.

Another misinterpretation of the Court's opinion occurs where the Master accepted the federal argument that *The "Anna"* was not authority for treating the mudlump there involved as an extension of the

mainland. Report, at 39. In response to a Louisiana argument, *the Master stated that the fact that something geographically constitutes part of the mainland was irrelevant to determining bay closing lines.* He cited the Court's analysis of *The "Anna"* to sustain this point when, in fact, it is exactly opposite in its significance. The federal government had argued that because *The "Anna"* did not involve delimitation of bays, it had no relevancy to the issue of whether islands should be treated as part of the mainland. This argument had occurred in the earlier proceedings before this Court and the Court had refused to accept it, noting that the essential feature of *The "Anna"* was that the Court had had to decide that the islands were "deemed part of the shore." 394 U.S. 11, at 64 n. 84.

Thus, it is submitted that when this Court said

> But if the court had been of the view that the three-mile belt extended from islands as well as the mainland, it would not have had to decide that the mud islands were "deemed the shore." 394 U.S. 11, at 64 n. 84.

it was meant that the government's argument was incorrect, that the case *was* valuable and persuasive material for the purposes of the Convention. Somehow this meaning is turned inside-out in the Report where the Master had only given negative effect to considerations as to the nature and origin of mainland islands:

> . . . their nature and origin is immaterial, although a non-fluvial origin might be a negative factor. . . . Report, at 39.

Contrast this to the treatment *of some of the very same islands* by the British Court in *The "Anna"*:

> . . . that they are the natural appendages of the coast on which they border, and from which indeed they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law. . . . (*Quoted with approval*) 394 U.S. 11, at 64 n. 84.

Further contrast the Master's "immateriality" reasoning with the statement from *Wheaton, quoted* 394 U.S. 11, at 64-65 n. 84, "[t]he term 'coasts' includes the natural appendages of the territory which rise out of the water. . . ."

In spite of this, there was a rejection of such evidence on the grounds that other tests had to be cumulatively met, one of which was relationship to the coast. Report, at 38, 39. It was not discerned that Wheaton's point involved relationship to the coast.

Compare also the Master's finding of immateriality with this Court's language: "And it is ancient lore that islands created by sedimentation at river entrances are peculiarly integrated with the mainland itself. . . ." 394 U.S. 11, at 65 n. 84.

Nys' words, "The islands situated at the mouth of a river are embraced as part of the territory. . . ." *quoted by this Court*, 394 U.S. 11, at 65 n. 84, clash with the Master's patent error, "nature and origin is immaterial, although a non-fluvial origin might be a negative factor. . . ." Report, at 39.

This led to further error—failure to consider ad-

ditional arguments which favored treatment of the islands as part of the mainland, if only one factor did not favor assimilation. In note 84 of the *Louisiana Boundary Case*, 394 U.S. 11, at 65, this Court had referred to several important authorities, one of whom was the eminent Dr. G. Etzel Pearcy, formerly the Geographer of the Department of State. Dr. Pearcy had pointed to a single factor, mentioning the distance from the mainland, as a point which could alone result in practical treatment as part of the mainland.

> ". . . They may be near, separated from the mainland by so little water that for all practical purposes the coast of the island is identified as that of the mainland." 394 U.S. 11, at 65 n. 85.

It is impossible to reconcile Dr. Pearcy's statement (which utilizes only *one* factor) *and the Court's approval of it* with the requirement that *all* factors must be satisfied. The Master's holding is also irreconcilable with the Court's quotation of Shalowitz that each case "must be individually considered." 394 U.S. 11, at 65 n. 85.

The incorrect interpretation of the Court's opinion also resulted in disregarding the more than 100 years of American and international practice concerning islands which are treated as part of the mainland because they are less than 10 miles from shore and from each other. This practice included a decision of this Court. Reference is made to *Louisiana v. Mississippi* in which the Court expressly recognized that Mississippi Sound was

> . . . an enclosed arm of the sea, wholly within

> the United States, and formed by a chain of large islands, ... 202 U.S. 1, at 48.[59]

The reasoning which followed this remark was that "the openings . . . are neither of them 6 miles wide." [60] The fact that this treatment of the island-enclosed area by the Supreme Court was a treatment of the sound as inland water is admitted elsewhere by the government to have been a classification as inland water. See *Brief for United States in Support of Motion for Judgment on Amended Complaint* in the Supreme Court of the United States, October Term 1957, No. 11 Original, *United States v. States of Louisiana, et al.*, at 254. Nor was the Court's treatment of Mississippi Sound a de novo matter, as more extensively treated in Appendix I, at 63-126. The United States had long recognized in its foreign relations that Spanish claims, British claims, and even modern Cuban claims based on similar reasoning were valid.

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[59] Contrast this to the hypertechnically logical but realistically unsound analysis of the juridical character of Mississippi Sound in U.S. Exh. 416D, Chart 1267, wherein the government now maintains that there are parcels of international waters within Mississippi Sound although they are wholly surrounded by territory of the United States. We are concerned with whether islands should be realistically treated as part of the mainland.

[60] The practice was expanded to a 10-mile standard later as hereinafter discussed. All island openings in contest are markedly less than 6 miles—some are measured in mere feet. See the 1,600 and 500 foot openings of the islands at Southeast Pass compared to the miles of distances which did not deter Judge Maris from assimilating non-highway connected islands to the mainland. See Figures 34 and 35, Appendix I.

When in 1950 it came time for the government to demarcate the precise extent of inland waters recognized by it as forming the outer limit of state properties along the coast, to apply the decision in *United States v. Louisiana*, 339 U.S. 699, a well-established rule of international law existed which was then applied in highly publicized maps. In the meantime, since 1906, the 10-mile standard had become established to give greater precision to the principle this Court had recognized in 1906. This resulted from the work of the eminent Geographer of the Department of State, Dr. S. W. Boggs, and the position of the United States at the Hague Conference. In fact, the standard had, by 1950, been officially applied to the entire United States coast. See Proudfoot, *Measurement of the Geographic Area of the United States*, 33 (1946) in his discussion of the official remeasurement of the United States in 1940 pursuant to the mandate of Congress in connection with the 1940 census. See also the maps attached thereto, Plate 8, *Proudfoot, op. cit.*, p. 45 showing that by use of mudlump island headlands, this official measurement of the territory of the United States closed off Garden Island Bay, using the Southeast Pass mudlump islands. It also closed off all of the other bays of the Mississippi Delta consistent with the headland contentions of Louisiana on the use of islands. See especially the treatment of East Bay as inland waters therein and treatment of Caillou Bay as inland waters. Proudfoot stated *op. cit.* at 33,

A solution for the problem of setting outer

> limits for the United States was obtained by special adaptations, pertaining to embayments and islands, of the excellent principles established by S. W. Boggs, Geographer of the Department of State, in delimiting the territorial waters of the United States.

This statement with respect to territorial waters was explained in a footnote at that point as stemming from Boggs' article on delimitation of the territorial sea as proposed by the United States at the Hague Conference. It pertained to demarcation of the baseline for commencing the measurement of the territorial sea, essentially the same problem now before this Court. One of the standards adapted from the Boggs' article explaining the position of the United States at the Hague Conference was

> . . . two or more islands less than ten and more than one nautical mile from shore shall be connected by a straight line or lines, and other straight lines shall be drawn to the shore from the nearest point on each end island. Proudfoot *op. cit.* 33.

This history of dealings with the British, Spanish and Cuban governments; this history of the Court's recognition of the inland status of Mississippi Sound due to the six mile island assimilation test; this history of the 10 mile islands as mainland test that grew out of United States practice reported at the Hague conference; this history of actual application of the standard by the agency charged with officially measuring the territory of the United States—these his-

torical realities compelled recognition that the waters behind islands along the coast of Louisiana were part of the mainland. The 1950 demarcation of inland waters recognized by the United States was confected and put on publicized maps, maps which treated the islands of the Mississippi Delta as part of the mainland and which treated Caillou Bay and the other island headlands claimed by Louisiana as part of the mainland. Thus, it was not some act of largesse, but established practice under international law long-recognized and applied by the United States. See 1 *Shalowitz*, 161, wherein there also appear excerpts from a memorandum of the Coast and Geodetic Survey which was cited with approval by this Court, 394 U.S. 11, at 65-66 n. 85.

One of the principles quoted by the Court from the memorandum (that the coastline should embrace islands which are sufficiently enclosed to constitute inland waters) immediately followed Shalowitz's expression of the particular standard for measuring sufficiency of enclosure,

> . . . so closely grouped that no entrance exceeded 10 nautical miles . . . . 1 *Shalowitz*, at 161.

That formula was the basis for 18 years of recognition by the United States in this litigation that all of the Louisiana coastal islands formed sufficient enclosures for intervening waters to be part of the mainland, that is, inland waters.[61]

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[61] See 394 U.S. 11, at 42: "The theory of the Convention, it is argued, reflects a long-standing principle of interna-

The waters between islands that are assimilated to the mainland and the physical mainland are known as straits leading to inland waters. See 1 *Shalowitz*, 108 n. 7, cited *supra*. Mr. Shalowitz, Dr. Pearcy, the Department of Justice, the Department of State, and the U.S.C. & G.S. specifically determined that each of the Louisiana island situations fits the exceptional situation, that is, they created *a sufficient enclosure to enclose inland waters or formed an integral part of a landform*, and thus created straits leading to inland waters. See the portico and landform illustrations in Figure 25, 1 *Shalowitz* at 162. Shalowitz stated that

> The second part of the recommendation (the exceptional part) deals with situations *characteristic of the Louisiana coast*. . . . It was the basis for drawing the Chapman line. [Emphasis added.]

This passage referred to the recommendation in the quotation of an April 18, 1961 memorandum from

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tional law—that bays and other inland waters are practically assimilated to the dry land and treated *for all legal purposes as if they were a part of it.*" [Emphasis added.]

After an extensive consideration of the history of the Convention's provisions, this Court accepted Louisiana's argument, holding that the low-tide elevations in controversy were to be treated as though they were within three miles of the mainland by reason of the fact that they were within three miles of inland waters, although more than three miles distant from corporeal "land." 394 U.S. 11, at 42 *et seq.* The very word "inland" means *in* land, thus any formula for determining whether islands are realistically part of the mainland is also a formula for determining the status of the intervening waters. The converse is equally true.

the Director of the Coast and Geodetic Survey, found at 1 *Shalowitz* 161, quoted by the Court as support for its own views in note 85, 394 U.S. 11, at 65. *The Court* referred to the sufficiency of enclosure and integral part of a landform tests not as mere *factors*, but as *a rule for the assimilation of islands to the mainland.*

> The Director of the Coast and Geodetic Survey, Department of Commerce, has stated the following rule for the assimiliation of islands to the mainland....394 U.S. 11, at 65 n. 85.

The rule the Court quoted thereafter had a precise formula used to confect the 1950 line. The formula was stated on the same page from which the Court quoted the enclosure-landform rule above:

> . . . the principle followed in drawing the baseline was that waters enclosed between the mainland and offlying islands which were so closely grouped that no entrance exceeded 10 nautical miles in width were considered inland waters. 1 Shalowitz, *Shore and Sea Boundaries*, at 161.

This formula—the 10 mile assimilation test—is consistent with factors this Court spelled out, for the geomorphics of the matter are that it automatically takes most of the factors into account. Certainly, it gives precision to the "relationship to the coast" and "distance" factors, and even some effect to the shape, size, and utility standards.

Errors of Law Contributed to Erroneous Appraisal of Island Assimilation Evidence

This misinterpretation of the guidelines the Court

established, and of important legal aspects on realistic treatment of islands as part of the mainland, combined with the other legal errors mentioned above obviously influenced appraisal of evidence for several areas. Indeed, the Master made plain that in his mind the cumulative set of factors all had to be satisfied and failure to meet even one would defeat assimilation. See, *e.g.*, Report, at 37.

Evaluation of evidentiary detail can be colored by the major legal thrust of a decision. This appears to have led to errors in appraising island-headland evidence. There was a failure to consider adequately the precedent of Judge Maris' Florida Keys decision for comparatively evaluating Louisiana facts. See Appendix I, Figures 34 and 35. Further error is found in failing to give effect to the factual identity of *The "Anna"* to the Louisiana facts. Inconsistency is present as to the western headland of Atchafalaya, where all of the factors approved by the Master are satisfied, but yet the headland is rejected. The clear approval by this Court of the "integral part of a mainland form" concept of Shalowitz was not recognized as having anything to do with configuration of the Southeast Pass islands which are so nearly identical to the illustration found in 1 *Shalowitz* 162. See Figure 14, comparing the Court-approved Shalowitz conception of islands as part of a mainland form with La. Exh. 19, a photograph of the Southeast Pass lumps.

Thus, while articulating the "relationship to the configuration or curvature of the coast" factor of this Court's opinion, the Master in fact





Figure 14. Comparison of figure 25(b) from 1 *Shalowitz* 162 demonstrating islands as part of a mainland form with La. Exh. 19, a photograph of Southeast Pass mudlumps.

failed to give weight to it. See Report, at 41, 42, where the Report refuses to consider the Southeast Pass tight group of islands "all together," and denies significance to the fact that some of the islands lie across the coast even the government recognizes. Moreover, as to the outermost island of a group, the Report treats the distance factor as though no intervening islands were present. This rationalization further ignored other powerful facts of relationship. See, *e.g.*, Figure 14, *supra*.

Further error relates to the failure of the Master to accord any weight to the fact that an island is not in isolation but is rather a part of a tight group of islands in line with a mainland form on its natural extension. See Report, at 41 where the Master rejected reasoning that the proximity of islands within a group to an island which clearly formed part of the mainland was irrelevant, and compare that statement to the "relationship" directive of the Court. The relationship factor was mentioned in an ultimate conclusion, but its geographic meaning in fact escaped application, for certainly the "grouping" of islands in line with a mainland form relates an island therein to the mainland.

Shalowitz would soundly disagree with the erroneous conclusion of the Report at 41-42 that islands near the mouth of a bay should not have the bay line extended around them.

Shalowitz was willing to do it for a single island that was not even touched by the dashed

closure line that would be recognized absent the island. See Figure 15. This Court has itself given importance to the question of whether a closing line would touch an island and create mouths. 394 U.S. 11, at 59-60. If the islands at Southeast Pass are not a part of the mainland, whether or not they form a "screen," Shalowitz recognizes the line should be extended around them. See also the inconsistent factual finding that the first of the series of islands is crossed by the bay line, Report, at 41, with the finding, Report, at 42, that they are not located along the misnamed "natural" closing line of the bay. In fact, more than one island is touched by the closing line, at least one other low-water elevation is touched, and two are totally within the line. Certainly, this causes the group to have a special relationship to the coast.

No navigator would enter the bay in the less-than-one-foot water depths between the islands and low-water elevations. From earliest times mudlumps have been used as navigational entrance points. See the 1839 Talcott map in La. Exh. 23 showing the



Figure 15. Reproduction of figure 45 from 1 *Shalowitz* 225 demonstrating a bay closing line encompassing a single island that lies entirely seaward of the closing line that would be used if no island were present. See also related text in 1 *Shalowitz.*

high elevation of the mudlumps, and the way stakes with markers were present on them. Clearly, realistically the outer lump forms the natural entrance point, and realistic concern is the test.

If this were not so, the mudlumps would form multiple mouths. Incidentally, the Report misstates Louisiana's argument to be as characterized by federal argument—a screening island argument. This is not so. Louisiana maintains there is no "screening" "requirement" for closing lines at the mouth of a bay. See Article 7(3), where it is implicitly recognized that islands *outside* of a bay closing line create multiple mouths for it is provided that islands *within* an indentation shall be treated as part of the water area of an indentation. No "screening" test is given. See the interpretation of this Article by this Court, 394 U.S. 11, at 60 and the interpretation in 1 *Shalowitz* 225 n. 38, wherein Shalowitz discusses the International Law Commission background and reasons underlying Article 7 in support of his illustrations, Figures 44 and 45:

> The basis for this interpretation is the observation of the ILC that the presence of islands at the mouth of an indentation tends to link it more closely to the mainland (*see* text following note 29 *supra*). *It would seem to follow that where a choice of lines exists that line be selected that encloses the greatest area of inland waters. This is consistent with Art. 7, par. 5 of the convention which calls for a closing line to be drawn that encloses the maximum area of water possible,* and with par. 3 of the article which allows islands

> within an indentation to be considered part of the water area. The rule proposed would still leave unresolved the question of how far seaward from the headland line islands could be in order to be incorporated under the rule. The best solution would be to consider each case on its merits and apply a rule of reason. 1 *Shalowitz*, 225 n. 38. [Emphasis added.]

The evidence for the suitability of the headlands claimed by Louisiana is more extensively set forth in Appendix I, for the different bay closures as indicated below. Those summary arguments are adopted herein as though repeated in extenso, and only selectively supplemented below. See also Appendix III for a synopsis of bay closing line contentions.

For Atchalafaya Bay, see Appendix I, at 210-220 and 308-312.

The evidence at Atchafalaya Bay included expert opinion testimony by a geographer that the Shell Keys complex is part of the mainland and the western natural entrance point of the bay.[62] Massive quantities of photographs were submitted. Measurement data was presented in the testimony of the engineer, Mr. Whitaker, on treatment of this tight maze of low-water elevations as part of the mainland. Much of this evidence simply escaped the Master's attention, perhaps due to the illegible character of the cartographic symbols for low-water elevations. In each case the size and location

[62] See testimony of Dr. Melamid, tr. 3305-3306 and La. Exh. 192, Photos 18 and 21.

of the elevations make it impossible not to realistically view them as extensions of the mainland, if the map were clear. We believe the Master could have reached this conclusion only by erroneous map reading. He must have failed to recognize the dotted and difficult-to-discern low-water lines of the low-water elevations on the Set of 54 Maps in this area. He must have thought that all Louisiana was talking about was the more distant high-water elevation (island) at the extreme tip of the Shell Keys complex shown by solid, easy-to-discern lines which show only small, more distant high water peaks of the much more extensive low-water elevations. The low-water elevations of the Shell Keys complex run from their outer extremities all the way back to the shoreline of Marsh Island and are, at their closest point, separated by only the narrowest and most insignificant of shallow channels. The closest low-water elevation has an area separating it from shore which is minuscule compared to the area of the low-water elevation, as is the distance separating it from shore compared to the size of the low-water elevation. The more seaward water gaps are not significantly larger between the low-water elevations. However, it is not necessary to consider the full extent of the Shell Keys. The low-water elevations closest to shore are identifiable headlands. Mound Point, the outer point of Marsh Island, if the reef extension is disregarded, is itself an identifiable headland.

The western headland of Atchafalaya Bay is Marsh Island and its natural extension, the Shell Keys complex. This Court has ruled in favor of Cali-

fornia in deciding that where there is a pronounced land feature, the outermost extension should be selected as the natural entrance point thereon. See decree in *United States v. California*, 382 U.S. 448, at 451:

> In drawing a closing line across the entrance of any body of inland water having pronounced headlands, the line shall be drawn between the points where the plane of mean lower low water meets the outermost extension of the headlands.

Clearly, the Shell Keys complex is the outermost extension of Marsh Island. In any event, clearly Mound Point, not South Point, is a more outward extension of Marsh Island than South Point. Clearly, the Master erred in treating Louisiana differently than this Court treated California.

Furthermore, "size and location,"—the two criteria which the Master held Shell Keys and Point au Fer failed to meet, Report, at 52-53—are the least important of the illustrative (not mandatory) criteria which this Court suggested for his guidance. As heretofore stated, the Court's previous opinion relied heavily upon the British Court's decision in *The "Anna."* That decision expressly styled the islands in question as "*little* mud islands" but held that factor to be insignificant.[63] The island gaps of Shell Keys are quite small. The majority are 80 to 400 feet; the largest opening is 2,350 feet. See La. Exh. 188 B. *The "Anna"* islands were 2.5 miles from shore.

[63] Moreover, S. W. Boggs, one of the authorities cited approvingly by the Court, denigrates size as a test, stating "[t]he size of the island, however, cannot in itself serve as a criterion. . . ." *quoted in* 394 U.S. 11, at 65 n. 85.

The Shell Keys complex clearly meets other more significant criteria for assimilation suggested by this Court. The Master gave no weight to the fact that the "depth and utility of the intervening waters" throughout Shell Keys is negligible. Moreover, the oyster reefs upon which the islands and low-tide elevations composing the Shell Keys complex are located, are clearly fluvial in nature and origin, and present ecology. These reefs developed on the deltaic lobes of a former outlet of the Mississippi River. See La. Exh. 173, at 22. Their initial growth and their continuing, present-day life were and are dependent upon a supply of *fresh water and nutrients from* the mainland. Therefore, the islands and low-water elevations of the Shell Keys complex are geologically and biologically appendages of the mainland.

In sum, numerous key factors or comparisons to precedent were not applied and mandate assimilation of the Shell Keys and Point au Fer reef headlands, *e.g.*, negligible depth, non-utility of the intervening waters, larger size of the low-water elevations as compared to the gaps, small distances of the gaps as compared to other gaps in recognized assimilation precedents (*e.g.*, Florida Keys and St. Bernard Peninsula), relationship of the island configurations to each other, the massive number of the islands and low-water elevations, non-navigability, their assimilation to the mainland on charts, their portico effect, the sufficiency of the enclosure, the fact that they are a natural extension of a mainland form—all of this is substantiated in the record. See Appendix I, at 210-220,

308-312. Nature, origin, and present ecology are related to fluvial and mainland phenomena. The Master did not consider this mass of factors, although the Court had directed there was no limit on additional factors to be considered, simply because he found that one or two factors were negative and he viewed the law as therefore commanding that he ignore others.

The Master has recognized that the landlocked question should be considered

> . . . upon the basis of relationship between the width of . . . mouth to . . . depth . . . . Report, at 27.

This is a wholistic test, and contradicts the "landlocked" rationalization of the rejection of Mound Point as a headland. Waters at the center of the closing line and near the mouth of the closing line of *every* bay are not landlocked. It is the bay as a whole which we consider in determining whether the characteristic of landlocked is present. See Article 7 (2) of the Convention, which tests the question of landlocked by a consideration of depth of penetration in relation to width of mouth:

> . . . whose penetration is in such proportion to the width of its mouth as to contain landlocked waters. . . .

See U.S. Exh. 416D for many examples of less pronounced closures at more outward locations which were accepted by all federal agencies in lieu of a more pronounced inland headland pursuant to the principle of the decree in *United States v. California* quoted *supra* requiring use of the outermost extension

of a headland. A good example of this is found at Demarcation Bay in Alaska which is the subject of Figure 13 *supra*. The area in front of the foreshore of the low-water spit within the bay closing line shown in that illustration can hardly be deemed landlocked if viewed in isolation. Other illustrations abound. Thus, it is invalid to dismiss headland claims on the basis that use of a particular headland would result in the enclosure of some waters that are not landlocked.

As to the Point au Fer low-water elevation, the Master relegated to insignificance the very strong fact that the water intervening between the low-water elevation and the mainland is an oyster farm where inland-type mariculture is practiced and navigation is impractical and dangerous. Oyster farming in Louisiana is a peculiarly inland phenomena of our coastal bays. Thus, again the presence of unique and strong facts was ignored merely because a single factor of distance was allegedly not satisfied.

Turning to the Garden Island-Red Fish Bay and Blind Bay complex, both of which are so much governed by the question of the use of the Southeast Pass mudlump islands as a headland, we direct the Court's attention to general discussion *supra*, pp 116-135, and to Appendix I, at 260-271, which details substantial evidence and summarizes it from various exhibits and testimony in the record. These mudlumps are integrally parts of the Mississippi River natural levee landforms and are to be treated as part of the mainland.

Additionally, they serve as appropriate natural entrance points. Thus, in Figure 35 of Appendix I, at 270, the miles and miles of open water involved in Judge Maris' findings between islets are contrasted to the 500 to 1600-foot distance of waters gaps at Southeast Pass. Hydrographic survey information is presented, Figure 33, showing less than a foot of water between the openings and the continuous submarine character of the natural levee or mainland form upon which the mudlumps are situated here and everywhere else where they occur. Their relationship in shape to the mainland and to the configuration of the coast has been heretofore illustrated. The fact that they are characteristically incorporated into the mainland over time, as developed in the testimony of the geologist and specifically illustrated in Figure 30, Appendix I, at 261, was another factor overlooked. The factual identity with *The "Anna"* was overlooked. The fact that some of the mudlumps were within the closing line the government recognized and others were crossed by it was overlooked. The testimony showing they formed a portico and an extension of a mainland form which the Court deemed a significant factor, 394 U.S. 11, at 65-66 n. 85, was overlooked. The utility of the islands as navigational entrance points because of their visibility and the dis-utility and the danger of shallow intervening waters were overlooked. Certainly, if utility of intervening waters or danger to navigation are factors to consider in terms of navigational significance, then the fact that mudlumps are used by navigators as entrance points should be a highly persuasive factor. All

of these factors and others more fulsomely detailed in the discussions referred to above were rejected because merely 2 out of 8 or 9 relevant factors were found to not be satisfied here. Plainly, this is a case where misconstruction of the Court's opinion has resulted in erroneous ultimate fact conclusions, which are noticeably void of reference to details of evidence.

For other evidence of the Bucket Bend Bay area, see Appendix I, at 254-260 for a summary of evidence contradicting the Master's findings. The islands here are purely sedimentary and are classic examples of islands that are a natural extension of a landform, which are indeed normally incorporated into the landform, absent hurricane attack. See Figure 27, Appendix I, at 255, showing how it is characteristic of these river mouth islands to become consolidated into the mainland. The Report denies any consideration to the ultimate question of whether the islands are realistically to be treated as part of the mainland. Certainly, the Court will find that these islands realistically ought to be considered as part of the mainland from which they come and to which they will be joined.

Bucket Bend Bay presents an instance where the complete absence of references to the record is conspicuous. The Report at 37 simply states, without explanation, that the low-water elevations at Bucket Bend Bay do not satisfy the size, distance, shape, or relationship factors the Court mentions, and says there are no other criteria which would lead to a contrary conclusion. Reasons, facts, evidence in the record—nothing is cited in support of these insupportable con-

clusions, for nothing could be cited. As to size, these elevations are certainly no smaller than the islands in *The "Anna."* As to the *distance* from the mainland, they are a petty fraction of 10 miles, a minor percentage of 6 miles, minuscule compared to the 4,000 feet to multi-mile gaps of Judge Maris' opinion, and smaller than other island gaps which the Master assimilated, *e.g.*, at Caillou Bay. But somehow, here, minor distances are too great. The greatest gap is approximately 1,000 feet, the smallest less than 700 feet. As to shape, they are plainly a projection of a mainland shape, with a river mouth island shape this Court has heretofore favored. 394 U.S. 11 at 65 n. 84. As to relationship, if ever there was an extension of a landform, a sedimentary projection along a natural levee, the submerged river bank, is such a thing. As to the alleged absence of facts relating to other imaginable criteria, the river mouth character, the origin from the mainland, the fluvial nature, the *shallowness and non-utility of intervening waters*, the tendency to become incorporated into the mainland—none of these would, in the Master's Report, have anything to do with the matter.

This Court can form its own opinions. This it should do, to be sure that its guidelines to Masters are in fact followed. See *Mississippi v. Arkansas*, ____ U.S.____, 94 S.Ct. 1046, at 1049 in which this Court conducted its

> own consideration and . . . independent review of the entire record . . .

in a review of exceptions to a Special Master's report.

FIFTH EXCEPTION

CARTOGRAPHIC AND SURVEY QUESTIONS

The State of Louisiana further excepts to the Special Master's errors affecting several cartographic and survey questions in the Mississippi Delta such as not giving full effect to pre-December 6, 1969 chart configuration and failing to correctly find the times of the existence of certain islands, low-water elevations, or low-water areas.

Several cartographic or surveying oversights or errors occur in the Master's Report, which we have generally elaborated upon elsewhere.

For East Bay, we argued that the pre-December 6, 1969 chart configuration of Cowhorn Island should control even after that date, due to unreliability of post-hurricane survey related change, and for other reasons, see *supra* at 102-113. These arguments also apply to the low-water areas near Pass du Bois and Pass Tante Phine. See paragraphs (c), (d) and (e), Report, at 47 to which exception is taken for the same reasons argued for East Bay.

Additionally as to paragraph (e), Report, at 47, even the federal evidence showed the Pass Tante Phine spit was in existence prior to March 28, 1956, although the Master found it existed only for a few months from November 19, 1959, to February, 1960. See application of Gulf Oil, Sheet No. 1 of 14 sheets, dated March 28, 1956, U.S. Exh. 171, and compare to the Pass Tante Phine spit on the 1959 low-water survey maps. As to the finding paragraph (d), concerning termination of

its existence, see later photographs showing a part of it. La. Exhs. 44 and 45.

This is typical of the weak quality of the federal survey evidence relied upon by the Master in support of his conclusion and for which careful examination is necessary. The 1956 map of the existence of the spit also effectively refutes the claim that it could have only existed for a few months, as federal testimony had claimed, which was the apparent basis for the limitation of the time period afforded to it by the Master. The existence of the spit from March 3, 1956, until the aerial photographs of November, 1959, and February, 1960, should also have post-February, 1960 consequences for it demolishes the reasoning that such a landform is rapidly extinguished by natural forces.

The errors as to survey findings of the Report at 43 are contradicted by evidence summarized in Appendix I at 271-6, treating the South Pass mudlump problems. The islands should be recognized as having existed at all relevant times. See the mass of evidence summarized in Figure 36, of Appendix I, at 272.

See also the Caillou Bay discussion *infra*, concerning incomplete survey matters.

Exception is also taken to failure of the Report to correctly give effect to the erosion of the Joseph Bayou area and other changes in East Bay. See East Bay discussion *supra*.

SIXTH EXCEPTION

CAILLOU BAY

The State of Louisiana further excepts to the Special Master's conclusion that although he finds that Caillou Bay is in fact a juridical bay, the decision of this Court precludes his so holding.

We have earlier treated the fact that Caillou Bay is an historic bay. These arguments relate to those portions of the Master's Report which appertain to the juridical contentions of Louisiana, but indirectly support the historic claim. The historic facts also support the geomorphic claim for they plainly show Caillou Bay was once physically part of the mainland, and Isle Derniere a continuous land form. See La. Exhs. 185A and 185B.

The Master correctly found that the geographic-geomorphic circumstances, even present circumstances, of the Isle Derniere amply satisfied both the factors set forth by this Court, 394 U.S. 11, at 64 and the Master's more stringent standards on realistic treatment of islands as part of the mainland. Report, at 37. Under the procedure of this Court whereby the parties are to except to the portions of the Report with which they disagree, it is not incumbent upon Louisiana now to substantiate correctness of the Master's holding here which we shall do more fulsomely in our reply brief if his findings are challenged by the government.

Much evidence was available to the Master and not heretofore available to the Supreme Court. This included proof of serious error in the maps which were

used in government illustrations that led to the comment contained at note 88 of the Supreme Court's 1969 opinion, 394 U.S. 11, at 67.[64] The Court, obviously overlooking the arguments of Louisiana concerning the fact that the Isle Derniere was part of the mainland, mistakenly observed that no such arguments had been made by Louisiana. Clearly, then, in the review of the extensive briefs filed by both parties heretofore, oversight no doubt occurred in which the Court apparently based a conclusion on an erroneous assumption that the point had not been argued. The point *had been argued.* We reproduce here portions of the *Reply Brief* of Louisiana to the *Brief of the United States on Cross Motion for the Entry of Supplemental Decree No. 2* as to the State of Louisiana, filed September, 1968:

> We do wish to point out here however, that the federal explanation for not departing from its prior concessions to the effect that all of the waters between and behind islands off the Louisiana shores are sufficiently enclosed to constitute inland waters, applies with equal force to Caillou Bay, irrespective of whether it is a true bay, a strait leading to inland waters, or inland waters by whatever test. The Chapman Line recognizes

[64] It must be remembered that up until this phase of the litigation the United States recognized that the islands along the Louisiana coast enclose inland waters. This could account in part for the lack of stress on the fact that the islands at Caillou Bay formed part of the mainland. The United States only changed its position after the adoption of the Convention. Louisiana should not be deprived of its inland waters which the Master found Louisiana was entitled to under the evidence, except for certain language of this Court made before a complete hearing on the evidence.

> this waterbody as a bay and it has never been in dispute in this litigation until the rather surprising change in the federal position in its memorandum of January 19, 1968. We can understand that it was rather surprising to those charged with drafting the federal position on the closing lines between the Isles Derniere to find that the new federal theory called for not closing between the last several islands of the Isle Derniere chain, *because it is so clearly reasonable and sound to connect islands separated only by a foot or so of water or less; islands which so plainly form a portico to the mainland and which are such a clear, natural extension of the mainland, anyone merely looking at the map would realize that they must somehow have the effect of causing the waters behind them to constitute inland waters because of the great extent of the enclosure.* One can understand that it would be essential for the government to change its position at Caillou Bay in order to avoid recognizing basic principles that are unquestionably applicable . . . . [Emphasis added.] pp. 121-122.

The government itself recognized in the Statement of Issues that this was an open issue. See Report, Appendix A-1, at 60, Issue 11 (a). Louisiana will be materially prejudiced by the 18 years of the federal assertion as to the limits of inland waters in the Caillou Bay area and the federal recognition that the islands forming the Isle Derniere group were juridically part of the mainland, unless the finding of fact of the Master that Caillou Bay is a juridical bay is adopted. In essence, this prejudice relates to the fact that Louisiana had not theretofore insisted on the correct survey

of low water lines on the north or bay side of the islands; or upon similar survey of the supposed water-gaps, to show that they were in fact not water gaps, but continuous mainland. If the federal government takes exception to the finding at Caillou Bay that the islands are part of the mainland, then, in reply, we will fully treat evidence showing the prejudice. See 1 *Shalowitz*, 175 where Shalowitz explained that a reason for failure to resurvey the 1954 photography areas west of the Mississippi Delta was

> . . . the absence of possible dispute over the Chapman line . . . .

In an attempt to rectify this injustice, the Master has said that the claims of Louisiana as to additional land behind the islands must be accepted. The dynamics of change on oil accountings since 1950 are not noted. The prior assertions prevented Louisiana from discovering the full extent of land behind the islands. We cannot now possibly show what we would have discovered through 1954 field work or 1959 surveys not made. There is no way to fully prove what we might have discovered if we had conducted surveys we did not conduct; if we had conducted investigations we did not conduct; if we had demanded a new survey of the area we did not demand; if we had obtained agreements on coordinates on the back side as we did on the front side; if we had conducted aerial patrols over the years. In short, we contend that the extent of the area Louisiana is entitled to as a consequence of islands within the bay for which no survey was made and no agreement

reached should be the entire extent of area which we would be entitled to by recognition of the closing line. It was at least the government's burden to prove there was no land beyond the limits of the low-water survey of 1954 and of 1959. This they were estopped from proving. This, in fact, they did not even attempt to prove. The Louisiana evidence stands unrefuted, that there were undetermined extents of land, that the exact extent of which can not now be reestablished. Necessity to rectify this injustice will be avoided if recognition is given to the fact that Isle Derniere is an extension of the mainland, not only in front of Lake Pelto but also in front of Caillou Bay, as found by the Special Master in determining that Caillou Bay is a juridical bay.

Whether or not the Court rules that Caillou Bay is inland waters, the island assimilation question will affect three-mile projections.

CONCLUSION

HAVING CONFIRMED FEDERAL TITLE TO THE GREAT MASS OF THE CONTINENTAL SHELF, CONGRESS DID NOT INTEND TO BE PETTY ABOUT COAST LINE MINUTIAE

In leaving the subject of the many marginal technical questions concerning coastline determination, it is appropriate to observe that this Court should not have to be belabored with the technical conflicts engendered by unremitting rigidities of the federal position.

From a national perspective, the federal government is receiving the vast bulk of the resources of the Continental Shelf and the great majority of territory and financial benefits which have accrued and are to accrue. See map and data, "Annual Drilling and Production Report," *Offshore*, Vol. 34, No. 7, June 20, 1974, at 77 *et seq.* reflecting the vastly greater participation of the United States in the offshore resources than that of the State of Louisiana.

Congress gave the vast bulk of offshore territory and resources to the national government in the grand division of the Continental Shelf made by it in the en-

actment of the Submerged Lands Act and the Outer Continental Shelf Lands Act. It therefore did not intend that there should be parsimonious interpretations of technical coastline details that are highly important to the states but insignificant from the national perspective. See also the accountings reflecting that Louisiana has received merely 37 million dollars from the escrowed account in the Treasury and the federal government has received more than 1.3 billion dollars plus many additional billions from Zone 4 revenues, plus free use of the remainder of the escrowed funds to date. See *Motion by the United States for Leave to File Accounting and Accounting by the United States* dated December 20, 1971, and earlier accountings by the parties stemming from the December 13, 1965 decree.

The effect of the Tidelands coastline controversy on state-federal relations is not, from a national perspective, worth the relatively small value of the remaining lands in controversy. Those estuarine lands are highly important to each state, however, both monetarily and environmentally. Much healing would be accomplished in state-federal relations through a reasonable interpretation of the coastline problems. Perhaps as important, other states in this energy-short era will not be led to resist offshore development out of fear that it will presage a sophisticated and intensive federal attack on the maritime territorial limits of the state. Serious negative implications arise as to the impact on the power of states to protect their coastal environment and other vital coastal interests other than petroleum revenues. Coastal management

needs, such as Louisiana has for the new Atchafalaya Delta, make our territory important for more than monetary reasons. See also the many coastal wildlife preserves, *e.g.*, Marsh Island and Pass a Loutre Game Preserves, boundaries of which are at stake. La. Exh. 8.

Even the funds presently in escrow are, in the main, to be awarded to the United States, even if Louisiana were *entirely* successful in the present hearing on the Special Master's Report. This is for the reason that the decree of December 20, 1971 (382 U.S. 288, awarding tens of thousands of square miles of territory to the United States), excluded so-called split leases (divided by the lines of the decree) merely to postpone administrative accounting and lease maintenance problems until the total resolution of this controversy. At that time amity will be required to resolve the problems unless we are to find ourselves in this Court contesting every detail of well locations, unit boundaries and lease administration questions that arise. Even if this Court were to recognize *all* of Louisiana's remaining claims, still its resulting judgment would give the bulk of the escrow account to the United States, but eliminate worrisome future problems. For example, if Louisiana's historic claims are recognized, then the kinds of survey problems and shoreline change questions which have so complicated the East Bay controversy will not arise again. Otherwise, they will be continually repeated, especially if the shore of the bay is used as a baseline. See testimony of Dr. Melamid, the Professor of Eco-

nomic and Political Geography from New York University, tr. 3246-3268, commenting upon the superiority of the more stable boundary regime which inland water classification affords in the context of the Mississippi Delta and Caillou Bay.

Congress, in writing the Submerged Lands Act was aware that it had awarded the lion's share to the national fisc in a separate act, the Outer Continental Shelf Lands Act, as the map in the *Offshore* journal so dramatically demonstrates. In this broader context, this Court should not be burdened with the effort of the Department of the Interior to get every last drop of oil and every last dollar it can prevent from going into state fiscs, by persistent technical positions on areas that are so important to the state and so minor on the national plane. It is well to recall the words of the former Solicitor General, the Honorable Archibald Cox, in the opinion approved by the then-Attorney General of the United States, the Honorable Robert Kennedy, reflected in La. Exh. 27, at 28.

> Congress was not in a niggardly mood, holding out every bit of land that it could find an excuse to retain.

Respectfully submitted,

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PROOF OF SERVICE

I, the Attorney General of the State of Louisiana, certify that copies of the foregoing exceptions to the report of the Special Master, and brief, and related appendices have been properly served on the 29th day of November, 1974, by mailing copies, sufficient air mail postage prepaid, to the Solicitor General and to the Attorney General of the United States, Department of Justice, Washington, D.C. 20530.

/s/ William J. Guste, Jr.

November, 1974.
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